IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 19___

No. 79-810

JEROME A. (JERRY) KNAPP - - Appellant

versus

COMMONWEALTH OF KENTUCKY - - Appellee

On Appeal from the Supreme Court
of the State of Kentucky

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The Memorandum Opinion Per Curiam Affirming the conviction of appellant by the Supreme Court of Kentucky (being the highest court of the state), was rendered on June 12, 1979, and a Petition for Rehearing, Modification or Extension was denied and its mandate issued on July 24, 1979, copies of which are in the Appendix, *infra.*

JURISDICTION

This is a criminal case under Indictment No. 11922 in McCracken County Circuit Court, Paducah, Kentucky, wherein appellant was found guilty for violation of Kentucky Revised Statute 516.060.

Date of the judgment, decree or opinion sought to be reviewed was rendered on June 12, 1979 and the petition for rehearing was denied on July 24, 1979; time of entry unknown.

Date of order of the Supreme Court of Kentucky was rendered on August 23, 1979 granting appellant a stay of execution and enforcement of the mandate under CR 76.44 of the Kentucky Rules of Criminal Procedure and granting appellant time to file a writ of certiorari to the Supreme Court of the United States within the 90-day period prescribed by law. A motion to reconsider the Court's order was filed by appellee on August 23, 1979 and the Supreme Court of Kentucky denied the same on September 4, 1979, copies of which are in the *Appendix,* infra.

Jurisdiction of the Supreme Court of the United States is invoked under Title 28 USC Section 1257(3) and Title 28 USC Section 2101(d), through a writ of certiorari, to review the final judgment, decree or opinion of the highest court of the state being the Supreme Court of Kentucky.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sheriff of McCracken County unlawfully searched and seized evidence on April 14, 1976 without a lawful search warrant consisting of corporate and personal records of appellant after a third motion to suppress filed on September 21, 1976 was denied by the trial court, in violation of appellant's rights under the Fourth Amendment of the U. S. Constitution.

2. Whether appellant was illegally arrested on April 9, 1976 with no probable cause, in violation of the Fourth Amendment of the U. S. Constitution.

3. Whether the affidavit for search warrant executed on April 14, 1976 specified with particularity both the place to be searched and the items in plain view that can be searched for and seized, in violation of the Fourth Amendment of the U. S. Constitution.

4. Whether there was a showing of probable cause by the person issuing the warrant with precise information from which he could make his own determination that a crime had been committed by appellant and the items subject to seizure were where the applicant wanted to search, in violation of the Fourth Amendment of the U. S. Constitution.

5. Whether a search warrant was in existence on April 14, 1976 where Court's Exhibit No. 3 (First Search Warrant) had no date, no signature and no property found or listed thereon from Court's Exhibit No. 4 (Second Search Warrant) executed on April 14, 1976 at 10:07 a.m. o'clock, with no property found or listed thereon and with no signature of the officer making the search and seizure (in violation of the U. S. Constitution for questions presented for review hereinafter).

6. Whether Court's Exhibit No. 3 (Return of Property Found) on a separate sheet of paper with no date, no signature and a truckload of evidence seized went beyond the scope of the affidavit, in violation of the Fourth and Fourteenth Amendments to the U. S. Constitution.

7. Whether the indictment returned on April 16, 1976 was in conformity with the statute (KRS 516.060) and the instructions of the trial court to the jury, in violation of the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.

8. Whether a petition and a notice of change in venue for a fair trial denied by the trial court on August 31, 1977 was in violation of appellant's rights under the equal protection of the laws of the Fourteenth Amendment or any other pertinent amendment of the U. S. Constitution.

9. Whether the Sheriff of McCracken County unlawfully seized corporate records of fiscal year April 1, 1975 and ending March 31, 1976 in connection with the corporate profit or loss for income tax purposes, in violation of the Fourth and Fourteenth Amendments to the U. S. Constitution.

10. Whether the trial court erred in denying appellant's consolidated motion for suppression of evidence and/or dismissal of indictment filed on December 8, 1976, in violation of the Fourth and Fourteenth Amendments to the U. S. Constitution.

11. Whether the trial court erred by denying appellant's motion to produce exhibits not attached to the affidavit for search warrant and the supplemental motion to the consolidated motion for suppression of evidence and/or dismissal of indictment, both filed on January 26, 1977, in violation of the Fourth Amendment to the U. S. Constitution.

12. Whether the Sheriff of McCracken County unlawfully seized records of students which were part

and parcel of a "system of records" from the corporation (Institute of Electronic Technology a/k/a IET) without prior written consent of the students, in violation of Title 5, USC Section 522a, et seq., where appellant's second motion to suppress evidence was filed on September 17, 1976 and denied by the trial court.

13. Whether the prosecution proved all of the elements of the crime beyond a reasonable doubt, under KRS 516.060.

14. Whether the trial court erred in denying appellant's motion for directed verdict at close of the Commonwealth's case based upon failure to prove every element of the crime.

15. Whether it was error and an abuse of discretion under all the circumstances for the trial court to deny appellant the benefit of the expert testimony of James Debowski, where the prosecution had to prove appellant's "knowledge" of a forged instrument, or whether the instruments were forged.

16. Whether the trial court erred by denying appellant's motion to allow analysis of handwriting signatures filed on January 27, 1977 and the motion to allow spectograph analysis of signature of Court's Exhibit Nos. 1, 2 and 4 filed on January 26, 1977.

17. Whether substantial errors were made in the trial court's instructions on October 6, 1977, which instructions misled and confused the jury as to the guilt or innocence or amount of punishment of appellant.

18. Whether the trial court erred in giving Instruction Nos. 17 and 18 because of the confusing and misleading definition of "reasonable doubt" applied to

the case as a "whole", instead of restricting it to "each count".

19. Whether the trial court erred in instructing the jury upon a theory of the case not sustained by the evidence, or upon a theory opposed to the evidence and prejudicial to appellant.

20. Whether the trial court and prosecution erred in sentencing appellant on count No. 4 which was both dismissed and retained, and count No. 2 which was neither dismissed nor retained, and dismissing counts 17 through 41, incl. after the jury heard and saw evidence relative to certain counts which should have never been before the jury because of the possibility of prejudice.

21. Whether the trial court erred in not distinguishing the appellant as an employee of the corporation from the corporation itself.

22. Whether the trial court erred in introducing inadmissible evidence where the Commonwealth admitted in its response to defendant's motion for suppression of evidence filed on September 17, 1976 that the contracts in question are between the corporation (IET) and Associates Financial Services of Kentucky, Inc. (Associates) and not between the students and Associates.

23. Whether the prosecution erred in not complying with appellant's first supplemental motion for Bill of Particulars and/or to dismiss indictment with appellant's affidavit dated December 7, 1976, filed on December 8, 1976.

24. Whether the prosecution complied with appellant's motion for discovery and inspection filed on September 21, 1976 and granted by the trial court on September 27, 1976 in connection with the third drawer of the filing cabinet in the prosecutor's office which contained evidence relative to the indictment of appellant.

25. Whether the prosecution complied with appellant's second supplemental motion for bill of particulars and/or dismiss indictment filed on June 20, 1977.

26. Whether the trial court erred in denying appellant's supplemental motion to suppress and/or to dismiss filed on August 22, 1977 and August 26, 1977, respectively.

27. Whether the 41 count indictment violated Regulation "Z" of the Federal Reserve Board where appellant's first motion to suppress evidence and for dismissal of indictment filed on September 2, 1976 was denied by the trial court at a pre-trial hearing on September 27, 1976.

28. Whether the prosecution complied with the trial court's order of February 10, 1977 as to paragraphs No. 1 and No. 2 in appellant's motion to produce and disclose filed on February 7, 1977 and whether the trial court erred in denying appellant paragraph No. 3 of said motion.

29. Whether the trial court erred in denying appellant's motion for directed verdict at close of appellant's case, filed on October 4, 1977.

30. Whether the trial court erred in denying appellant's motion for new trial filed on October 11, 1977 and heard on October 28, 1977.

31. Whether the prosecution committed reversible error by not introducing relevant and competent evidence to support its opening and closing statements in the record of this case.

32. Whether the prosecution violated Kentucky Revised Statute 360.260 stating that state law shall require disclosure of items of information substantially similar to the requirements of any applicable Federal law.

33. Whether the evidence on an insufficient count would taint the entire conviction.

34. Whether the sentence of 20 years in prison was in violation of the 8th Amendment of the U. S. Constitution and case law of this Court.

35. Whether the trial court erred in sentencing appellant on four consecutive counts for the maximum penalty of 20 years allowed by Kentucky law, not stating which concurrent sentences were to run with a particular valid consecutive sentence, and the appellate court not passing on the validity of each consecutive sentence.

STATUTES INVOLVED

The individual Federal Constitutional Rights of appellant which were violated are the 4th, 5th, 6th, 8th and 14th Amendments to the U. S. Constitution, which briefly state as follows:

1. *First Amendment of the U. S. Constitution:* guarantees freedom of speech, press, assembly, right to petition, free exercise of religion and the prohibition of religious establishments.

2. *Fourth Amendment of the U. S. Constitution:* applies to arrest, and unreasonable search and seizure.

3. *Fifth Amendment of the U. S. Constitution:* prohibits double jeopardy, compulsory self-incrimination, and taking of private property without just compensation.

4. *Sixth Amendment of the U. S. Constitution:* applies to right of counsel, speedy and public trial, confrontation of witnesses, and compulsory process for witnesses.

5. *Eighth Amendment of the U. S. Constitution:* prohibits cruel and inhuman and unusual punishment.

6. *Procedural Due Process of the Fourteenth Amendment of the U. S. Constitution:* The Bill of Rights entitles persons accused of a crime to procedural safeguards. The Fifth and Fourteenth Amendment Due Process protects certain largely undefined liberty and property interests outside the criminal context.

Required Hearing is determined by:

1. Individual interest involved.
2. Value of safeguards to that interest.
3. Governmental interest in efficiency.

7. *Substantive Due Process of the Fourteenth Amendment of the U. S. Constitution:* now requires only that laws and regulations be rationally related to some legitimate governmental purpose, unless basic

civil or political liberties are infringed; economic legislation is now rarely overturned for irrationality.

8. *Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution:* is violated by invidious discrimination/or/arbitrary classifications bearing no rational relation to the object of legislation.

9. *Elements* of the crime under KRS 516.060 are as follows:

1. Appellant had the "knowledge" that the instruments were forged.

2. With the intent to defraud, deceive or injure another.

3. That he uttered or possessed any forged instrument of a kind specified in KRS 516.030.

The constitutional provisions and KRS 516.060 cited above and the Kentucky Rules of Criminal Procedure are set out verbatim in the appendix, *infra.*

STATEMENT

A concise statement under Rule 23(1)(e) containing the facts material to the consideration of the constitutional questions presented are as follows:

This is a criminal case in which defendant, Jerome A. (Jerry) Knapp, hereinafter referred to as "appellant", appeals to the Supreme Court of the United States from a judgment of conviction affirmed by the Supreme Court of Kentucky, being the highest court in the state, for violation of Kentucky Revised Statute 516.060 and sentencing appellant to twenty (20) years in prison under Indictment No. 11922 of McCracken County Circuit Court, Paducah, Kentucky.

Elements of the crime under KRS 516.060 are as follows:

1. Appellant had the *"knowledge"* that the instruments were forged.

2. With the *intent* to defraud, deceive or injure another.

3. And that he *uttered* or *possessed* any forged instrument of a kind specified in KRS 516.030.

The "arrest" of appellant was on April 9, 1976.

The "affidavit for search warrant" (Court's Exhibit No. 1) was executed by the prosecution and McCracken County Judge on April 14, 1976,

Search and seizure of the corporate records (Electronic Sales Engineers, Inc., d/b/a Institute of Electronic Technology, a/k/a IET), an Indiana corporation, and personal records of appellant-defendant, Jerome A. (Jerry) Knapp, consisting of a truckload of evidence, were taken by the prosecution and Sheriff of McCracken County on April 14, 1976.

The "indictment" was returned by the Grand Jury on April 16, 1976.

The "return of property found" (Court's Exhibit No. 2) was on a separate sheet of paper with no date, no signature and went beyond the scope of the affidavit with a truckload of fifteen (15) items of evidence.

The "first search warrant" (Court's Exhibit No. 3) had no date, no signature and no property found or listed thereon.

The "second search warrant" (Court's Exhibit No. 4) was executed by the County Judge on April 14, 1976 at 10:07 a.m. o'clock, with no property found or

listed thereon and with no signature of the officer making the search and seizure of the evidence.

The "search warrant" (Court's Exhibit No. 5) was a photocopy of the first search warrant, which is Court's Exhibit No. 3.

The Court's Exhibits are as follows:

No. 1	Affidavit	—Signed
No. 2	Return	—Unsigned
No. 3	Search Warrant	—Unsigned
No. 4	Search Warrant	—Signed but not a photo copy
No. 5	Search Warrant	—Photo copy unsigned

The trial date of this case was on September 12, 1977 and ended on October 6, 1977.

An order for an Appeal Bond in the penal sum of $12,500.00 was entered on November 4, 1977. Notice of Appeal to the Supreme Court of Kentucky and Designation of Contents of Record on Appeal were filed on November 8, 1977. The trial court, in its instructions, charged the jury that if you will find the defendant guilty, you will fix his punishment at confinement in the penitentiary for not less than one (1) year and not more than five (5) years, in your discretion. This was done under each of the sixteen (16) counts. The jury's verdict was five (5) years on each of the sixteen (16) counts, or, a period of eighty (80) years, which period was cut down to the maximum of twenty (20) years by the trial judge in its Trial Order and Judgment entered on the 6th day of October, 1977, in accordance with state law.

Appellant was born on July 27, 1935, 44 years of age, having three (3) children, namely Christine, 24

years of age, Jerome, Jr., 23 years of age, and Tracy, 17 years of age. Appellant was divorced in December 1972 and since that time he has had custody and raised his children. Appellant has a B.S. Degree in Electrical Engineering from Purdue University graduating in 1957, with a Masters Degree, working on his Doctorate. Appellant's first job was with his father, Edwin Knapp, 74 years of age, now living, who owned Knapp Electric Company, Evansville, Indiana.

Electronic Sales Engineers, Inc., an Indiana corporation, d/b/a Institute of Electronic Technology (a/k/a IET), was incorporated in 1964. Appellant owned 250 shares of capital stock of the corporation, being 50% owner and Richard G. May owned 250 shares, being the remaining 50%. The corporation (IET) redeemed the remaining 500 shares of the 1,000 shares of authorized capital stock in February, 1967.

Appellant was the president of IET between 1964 and 1969, working part-time in Paducah, Kentucky where the school was located. Richard G. May also worked part-time with a full-time manager. In 1969, appellant began working full-time in Paducah, Kentucky for the corporation as its president and employee. The school was located at 1301 Broadway, Paducah, McCracken County, Kentucky, 42001.

Appellant remained as president of the corporation until April 1976, at which time he resigned as its president and Richard G. May took over as its president. Richard G. May was also a director.

As an employee along with thirty to forty other employees of the corporation, appellant was head of

the technical end of the operation. The corporation had Ms. Carol Reid as the office manager, Mr. Blackburn in charge of training, building and maintenance, William Campbell as director of admissions and in charge of the sales representatives (hereinafter called "sales reps"), who contacted the students and explained the course to them and their parents, and thereafter, Mr. Campbell enrolled the students. Mr. Campbell's duties and responsibilities primarily were the handling of all enrollments, counseling and termination of students, advertising and the mailroom. He had full responsibility over these functions and did not consult appellant except for a change in policy. Under Mr. Campbell were the sales reps and the girls in charge of the mailroom, who took care of the students' records.

Duties of the four to five sales reps were to mail cards and letters to students who were high school seniors within a 300 to 400 mile radius, four times a year. If the students were interested in electronics, they would return the card to the sales reps, who in turn contacted the high school counselor or principal of the student to get the student's math and other grades, courses taken and attendance. If satisfactory, the sales reps contacted the students and parents, explained the program and recommended enrollment of the student.

The sales reps were paid $75.00 commission for each enrolled student and this amount was a draw against earned commissions. The sales reps received an additional $40.00 after the student was in school for four weeks, an additional $40.00 for 25 weeks, an additional $40.00 for 50 weeks and an additional $40.00 for 75 weeks. Mr. Campbell was paid an override commission of $25.00 for each enrolled student, and the same remaining commissions paid to the sales reps.

Mr. Campbell was the approving authority for the sales reps, the students' applications (first contract), financial information of the student, the Basic Education Opportunity Grant (a/k/a BEOG) and the Federally Insured Student Loan (a/k/a FISL) by a lending institution, all Federal programs of which were signed by the appellant after Mr. Campbell's approval. Mr. Campbell gave the officer manager, Ms. Carol Reid, an amount for earned commissions once a week, who in turn, issued a check for payment by using a "signature stamp" of Appellant, Jerome A. (Jerry) Knapp on the check.

Ms. Reid or Ms. McLeod opened a student file for each enrolled student, after direct approval and delivery made by Mr. Campbell, who received the students' questionnaires and determined which of the students needed housing and jobs to be given to IET's placement director, the financial information and financing of the tuition.

The student questionnaire was kept in Mr. Campbell's office until a determination was made by him as to whether the student needed housing, a job, transportation and financial aid. If the students needed tuition financing, or housing and jobs, the student questionnaire remained in a file in Mr. Campbell's office until the student was in school and settled within 30 to 60 days.

Students' files were kept in a filing cabinet in the reception room of the receptionist, who was Ms. Sheila McLeod. When she went to lunch, Ms. Reid or one of the girls in the mailroom would take over Ms. McLeod's position. The filing cabinet in the reception room was left unlocked during the day and was supposed to be locked during the night. The key to the lock in the filing cabinet was kept in Ms. Reid's desk drawer. During the day, almost anyone had access to this filing cabinet and desk drawer because Ms. Reid could not lock her desk.

In the mailroom, there were three girls who would send out from 1000 to 4000 pieces of mail each day, primarily Denise Thompson, Rhonda Blackburn and Yvonne Edwards. These girls would type envelopes for prospective students from high school senior lists within a 200 to 400 mile radius. Also, they were responsible for stuffing these typed envelopes, stamping and mailing them out each day. These mailroom girls also helped Ms. Reid and Ms. McLeod with typing and took care of student and school records at times. Ms. Yvonne Edwards was also the wife of Mr. Don Edwards, Branch Manager of Associates Financial Services of Kentucky, Inc., (a/k/a Associates), at Paducah, one of the lending institutions. Along with Mr. Campbell, the sales reps had access to the mailroom and the girls who worked there because one of their primary functions was advertising.

From 1964 to 1972, IET handled most of its tuition financing. In 1972, the branch manager of Associates at Paducah came to see appellant, for financing tuition

agreements. Thereafter, a new branch manager came into Paducah for Associates by the name of A. L. (Bud) Strup. Mr. Strup stated to appellant that Associates would do all of the bookwork and relieve the girls from a lot of strain and that Associates would collect the tuition agreements entered into by IET and Associates. Also, Mr. Strup was interested in exposure to young couples just getting married, with good jobs, cars and appliances, with the necessity to finance tuition agreements. Therefore, IET started financing tuition agreements with Associates in 1972.

IET now needed money because previous to that, IET was not involved in too many Federal programs. It was primarily a pay-as-you-go thing as the students earned their money. At this point, IET became eligible for Federally Insured Student Loans (FISL), Supplemental Opportunity Grants, National Direct Loans and Basic Education Opportunity Grants (BEOG). IET's primary problem was that it had to order books six months to one year in advance from McGraw-Hill Publishing Company, who printed these books every two years because of being technical in nature. If IET ran out of books, it would have to wait at least 6 months to get additional books if they were not ordered in advance. Another problem was the cost of lab equipment being very high with test tubes and glassware being broken periodically. Students would also burn up integrated circuits, maybe dozens of them each night. Some of them would run as high as $40.00 to $60.00 a piece. This lab equipment was not available locally and had to be ordered from the manufacturer

at Chicago or New York. Also, the instructors at IET had to be paid. When IET got into these Federal programs, it would inform the student that he was going to get a grant, a BEOG Grant, and the necessity of IET having to carry students from six to ten months before getting the first payment from the government was a factor for IET to cope with. This would cause a cash flow problem for IET and therefore IET was interested in financing tuition agreements with Associates at this point.

After IET developed problems with Associates, IET stopped doing business with Associates from 1972 until the latter part of 1973, one problem being the handling of student accounts. The whole idea was to have the student pay Associates, however, a number of students were not paying Associates and told the girls at the office of IET that they had made payments to Associates. This resulted in delinquent accounts because Associates did not follow up on the students for payment.

IET also had a Dealer Agreement with Associates in that Associates would deduct 25% of the gross amount of the contract after the finance charges were taken off and that they would maintain this amount until IET reached a contingency level of 50% of the gross outstanding contracts. This became a problem because Associates did not allow the drop-out students, or, ones who changed classes whenever they failed in an eight week period. These students were placed on probation and if the student failed for the second eight week program, the student would either have to drop

back and take that course over again, or be terminated and sent home. IET always had 20% to 30% of the students that were failing a particular part of the course and had to take it over again. IET also had students who dropped back to a later class because these students had to go home to help their fathers harvest the crops in the fall. IET had a number of students who would sign up in October, November and December of one year for the following June or July class and if there was a rainy spring and the crops were not out, these students would have to stay home and help their fathers. This would cause another transfer from June to an October class and if the students were signed up for the September class, they would have to transfer to the February class of the following year. Other students would drop out and work in a factory for a while until they decided to go back to school and re-enroll. Every time that a student would do this, they would have to be refinanced and Associates would again deduct the holdback of 25% plus the finance charge, thus ending up with some students who maybe had to drop back three times. Associates had more money in the holdbacks than IET was advanced to begin with, which was another problem.

When IET first started doing business with Associates, Associates assured IET that the 25% and 50% figure would be reduced to 10% after IET showed performance. Associates was holding up most of IET's cash flow, thus defeating the purpose of the agreement. Also, IET got into a problem with tuition where a student was seventeen and not of legal age, signed an

Associates' agreement and dropped out or got behind in his payments, but that Associates could not collect from the student or his parents because of lack of the parents' signature. If the student was a veteran, the wife's signature would be missing. Therefore, IET quit doing business with Associates at this point.

The total amount of Associates tuition agreement with IET was $3900.00 for each student. From this amount, interest was charged of $585.00, leaving a balance of $3315.00. From this amount, a holdback of 25% or $828.00 was made by Associates, leaving a balance of $2487.00 paid to IET on each contract. If there were ten contracts for a total amount of $39,-000.00, less the interest charged, ten contracts at $828.00 or $8280.00 would be the amount of the 25% holdback reserve. The purpose of the 25% holdback was to allow IET an option to pay off a contract from its bank account to Associates, or reduce the total holdback reserve by the amount of the contract, where a student did not make payment or dropped out. IET was owner of the holdback reserve, even though Associates had possession.

After an attempt to resolve the problems, IET again started doing business with Associates in 1974. Students were told to make their monthly payments to IET and IET in turn paid Associates. Also, the students did not need to sign the retail installment contracts and tuition agreements in question between IET and Associates, unless the students wanted credit life insurance. Appellee's Exhibit No. 26-B was the "Retail Installment Contract and Tuition Agreement" be-

tween IET and Associates. Mr. Vaughn Albert of Associates designed this contract with approval of Associates' Legal Department. This contract between IET and Associates had nothing to do with the student's application (first contract) accepted by IET and the student's questionnaire with IET.

Effective June 1975, IET received a new dealer number from Associates, so that when IET refinanced a student by taking him back in class, Associates would not holdback a second 25%. The interest charge would be made on the new contract not collected on the old contract. The amount that the student owed on the old contract would be charged against IET's holdback reserve account with Associates. Also, Associates informed IET that if a student would not drop out of school over six months, IET would continue making payments for the student until the student came back to school; that, after IET showed a little more performance in its tuition financing, this 25% and 50% holdback reserve would be reduced to 10%.

IET again stopped doing business with Associates in January 1976 because IET discovered that apparently there had been some refinancing of students and the balances had not been charged back by Associates to IET's holdback reserve account. Mr. Campbell of IET kept a list of the students whose contracts had to be financed, those contracts being the first contract between IET and the student and the second contract being the retail installment contract and tuition agreement in question between IET and Associates. Mr. Campbell gave appellant a stack of student question-

naires who needed to have their tuition financed. Again, the student questionnaire was prepared either by the student or by the sales rep under Mr. Campbell in the field. The student questionnaire was a mimeograph blank form kept on a shelf in the mailroom . The forms were printed later and everyone in the school (IET) had access to these forms. After Mr. Campbell delivered to appellant a stack of student questionnaires of students who needed their tuition financed, appellant would fill out in longhand the retail installment contract and tuition agreement between IET and Associates from the information contained in the student questionnaire, signed appellant's name thereon at the bottom left, without a student's signature at the bottom right of that retail contract in question and without appellant's signature on the assignment on the reverse side of that contract, at this point. The retail installment contracts and tuition agreements (subject matter of this case) were also kept, in blank, on the shelf in the mailroom near the blank student questionnaires. The mailroom had two shelves upon which all of IET's blank forms were kept. It was also used as a classroom.

After appellant filled out the retail contracts in longhand from each student's questionnaire and signed the bottom left with the student's signature at the bottom right if insurance was desired, he gave the stack of questionnaires and retail contracts to one of the girls at IET to type the "cover sheets" for the amounts of money and information contained in the retail installment contracts and tuition agreements.

One of the girls normally was Ms. Sheila McLeod, unless she was out to lunch or sick. At times, Ms. McLeod would give the typing job of the cover sheets to Ms. Carol Reid or to one of the girls in the mailroom or to the one sitting in as receptionist. After the cover sheet was typed, the stack of retail installment contracts and tuition agreements and student questionnaires and cover sheets would be returned to appellant, or have them laid upon his desk, sometimes lying there from a few hours to two or three days before the stack was given back to Mr. Campbell.

Mr. Campbell had the responsibility to call the student at home or see him in the evening at school to find out if the student wanted credit life insurance, and if the student wanted credit life insurance, the student was asked to sign on the line for credit life insurance at the bottom right of the retail installment contract and tuition agreement in question. After Mr. Campbell talked to all the students in the stack with regard to credit life insurance, he delivered the stack containing the retail installment contracts and tuition agreements and cover sheets back to appellant personally, if appellant was in his office, or leave them on appellant's desk if appellant was not in his office or lay them on Ms. Reid's desk. The student questionnaires were placed in each student's file by Mr. Campbell. At this point, there would still be no signature on the "assignment" of the retail installment contract and tuition agreement from IET to Associates.

After the stack got to appellant, appellant would normally take the stack to one of Associates' girls

behind the desk. It was either Patricia Driver Waddy or Debbie Cummings of Associates to whom appellant handed the stack for financing, during this period of time. At times, appellant would give the stack to Associates' Branch Manager, Don Edwards or Ron Henson, if they were there. Thereafter, Associates had the responsibility to call the parents of the students and the students' employers to verify these facts. For College Work Study on the student program, Associates automatically called Mr. Stubblefield of IET to verify this fact because Mr. Stubblefield was in charge of that program.

Mr. Campbell furnished appellant with a list of the students working for College Work Study and at one time, IET had over 300 students working for the City of Paducah, and most of the time, between 25 and 35 students working for the county, and other students in hospitals and non-profit organizations. Mr. Stubblefield would then get the list of students from appellant after appellant got the list of names from Mr. Campbell. Mr. Campbell did not directly call Mr. Stubblefield because appellant handled all Federally Insured programs with amounts allotted to IET. The Federally Insured program is not the subject matter of the Indictment returned in this case.

Appellant normally did not sign the "assignment" for IET contained on the reverse side of the retail installment contract and tuition agreement in question at the time of delivery of the stack to Associates. If appellant was leaving town, he would sign the assignments for IET before sending the stack (which contained the retail installment contract and tuition agreement, together with a cover sheet for each contract) to Associates to check out and discount them.

Associates did not "purchase" every retail installment contract and tuition agreement at the time of *delivery* by appellant or by someone from IET. It would take Associates from three, four or five hours to a week, normally one or two days, to verify the stack as to the name of the student, his parents' telephone number if he was under 18 years of age and the student's place of employment. Associates did not require the social security number of the student because it was not material, according to Associates.

After Associates verified and checked out the stack, it would either give appellant a telephone call to come and pick up the check, or, Associates would bring the check over to IET, or that IET would send for the check if appellant was tied up. On a number of occasions, Don Edwards of Associates would bring the check to IET or to appellant's office on his way to lunch. After acceptance of the check by appellant or his designee for IET, if he was in town, appellant would sign the "assignment" on the reverse side of the retail installment contract and tuition agreement for IET. Associates looked to IET for payment and not to the student. The check would be delivered by appellant to the office manager of IET, Ms. Carol Reid, who would deposit it into the IET bank account.

In each of the sixteen (16) counts of which appellant was convicted and given a five (5) year sentence on each count for a total of eighty (80) years in prison,

(later cut down to a maximum of twenty (20) years), the check was made out to either the Institute of Electronic Technology (IET) or, Electronic Sales Engineers, Inc. (ESE), the corporation, and Ms. Reid or her designee would stamp "For Deposit Only" on the backside of the check and deposit it into the corporate bank account at the Paducah Bank and Trust Company. The receipt book for the amount of the check would be receipted normally by Ms. Sheila McLeod and at times by Ms. Carol Reid. The receipt book was normally kept in Ms. McLeod's desk and the deposit stamp was normally kept in Ms. Reid's desk. Both desks were unlocked. The checks from Associates were never made payable to appellant personally.

Appellant and Richard G. May were the only ones having the authority to sign checks for IET because they had their names on the signature card at the bank. Appellant and Mr. May had a "signature stamp" used to cash IET checks. These signature stamps were stamped on a separate card at the bank, with the handwriting of appellant and Mr. May, and those signature stamps were kept in Ms. Carol Reid's desk, again unlocked.

Since 1972, Associates never made a check payable to the appellant personally, or to anyone else at the school. Further, Associates never made a check personally payable to appellant involving the sixteen (16) counts in this case. All of the checks were made payable to IET or ESE.

Appellee's Exhibit No. 3-B and No. 34-B did not have appellant's signature on the "assignment" on the

reverse side of the retail installment contract and tuition agreement, but Associates issued its checks for those contracts. Appellant did not deliver those particular contracts to Associates, and IET or appellant have no idea as to who delivered those exhibits to Associates.

Appellant had "no knowledge" as to who placed the students' signatures on all of the exhibits, being the subject matter of the Indictment, or when they were placed thereon. Furthermore, appellant personally did not place the students' signatures on the contracts or have any knowledge as to when or who placed the students' signatures on the contracts for credit life insurance.

Appellant did not, during the period covered by the Indictment, intentionally defraud or injure, or attempt to defraud, deceive or injure anyone by discounting retail installment contracts and tuition agreements for IET with Associates.

Furthermore, appellant did not have the *"knowledge"* that the contracts in question were "forged" before or at the time of discounting the same.

Under Rule 23(1)(f) of Rules of the U. S. Supreme Court, if a judgment of a state court is sought, the statement must contain (a) the stage of proceedings in the trial and appellate courts that the Federal questions to be reviewed were raised; (b) method of raising; (c) decision of said courts; (d) specific reference to record where matter appears, in order to give the U. S. Supreme Court jurisdiction.

1. Motion to Suppress Evidence and/or Dismiss Indictment filed 9/2/76 and Second Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/17/76 passed by trial court at pre-trial hearing of 9/27/76, pp. 36 thru 38, 41 and pre-trial hearing of 2/3/77, Vol. II, p. 200.

2.(A) Third Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/21/76 pertaining to violation of defendant's rights under the 4th, 5th, 6th and 14th Amendments of the U. S. Constitution, overruled only as to dismissal of indictment by trial court at pre-trial hearing of 9/27/76, p. 42 and pp. 115 thru 117.

2.(B) *Probable Cause:* Defendant arrested 4/9/76, however informer went to prosecutor's office on 4/13/76 to swear out a warrant against defendant, therefore, no probable cause as of 4/9/76. See pre-trial hearing of February 3, 1977, Vol. I, p. 47.

3. Third Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/21/76 pertaining to violation of Federal Reserve Board Regulation "Z" (12 CFR Section 226, Title 12, Chap. II, Part 226 and Title I, Truth and Lending Act and Title V, General Provisions, Credit Protection Act, Public Law 90-321, 82 Stat et seq., eff. 7/1/69 and 15 USC Sec. 1601-1691), overruled by trial court on 9/27/76 appear in pre-trial hearing of 9/27/76, pp. 73 thru 76, and the contracts in question lacking legal efficacy, which appears in pre-trial hearing of 9/27/76, pp. 85 thru 88.

4. Third Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/21/76 pertaining to the unlawful search and seizure of evidence, without a search warrant, illegal arrest on 4/9/76, in violation of the 4th Amendment of U. S. Constitution, Section 10 of the Constitution of the Commonwealth of Kentucky, overruled by trial court which appear at pre-trial hearing of 9/27/76, pp. 90 thru 119, and pre-trial hearing of 1/24/77, p. 107.

5. Second Search Warrant not filed until after the pre-trial hearing of 9/27/76, as stated by the prosecution that he needs to file this search warrant, appear at pre-trial hearings on 9/27/76, p. 63, and pp. 90 thru 95, pp. 108 thru 119. Also see pre-trial hearing of 1/24/77, p. 95.

6. Third Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/21/76 pertaining to the search and seizure of evidence which went beyond scope of the affidavit for search warrant, overruled by trial court on 9/27/76, appears at pre-trial hearing of 9/27/76, pp. 97 thru 98, 118 and return of property found, which appears in pre-trial hearing of 9/27/76, pp. 105 thru 110.

7. Consolidated Motion for Suppression of Evidence and/or Dismissal of Indictment filed 12/8/76 pertaining to:

A. Unlawful search and seizure of evidence violated defendant's rights under the 4th, 5th, 6th and 14th Amendments of the U. S. Constitution and Section 10 of the Kentucky Constitution.

B. Unlawful search and seizure constituted an absolute invasion of defendant's rights of privacy and exceeded the legal permissible limits.

C. The evidence unlawfully seized was not in plain view of the arresting officers.

D. Unlawful search and seizure was not made pursuant to defendant's consent, therefore, defendant did not waive his rights.

E. Police officers arrested defendant on 4/9/76, the unlawful search and seizure on 4/14/76, the indictment returned on 4/16/76, therefore, the search was not made incidental to a lawful arrest.

F. No probable cause for the search.

G. At no time did defendant have any weapon or something of similar nature to do grievous bodily harm to anyone.

H. Affidavit for search warrant, Court's Exhibit #1, executed on 4/14/76.

I. First search warrant, Court's Exhibit #3, not executed.

J. Second search warrant, Court's Exhibit #4, executed on 4/14/76.

K. No return of property found on second search warrant of evidence illegally searched and seized, Court's Exhibit #2.

L. Whereabouts of the second search warrant, Court's Exhibit #4, from 4/14/76 to 9/27/76, when it was presented to the trial court.

M. Contracts in question being between IET and Associates and not between Associates and students, therefore, no forgery.

N. Title 5 USC 552a, subsection 7 of Student Privacy Act violated prior to indictment returned on 4/16/76.

O. Violation of KRS 360.260 which states that state law requiring disclosure of items of information must be substantially similar to applicable Federal law.

P. Violation of Federal Reserve Board Regulation "Z" of 12 CFR Section 226, Title 12, Chapter II, Part 226, Title I, Truth and Lending Act, and Title V, General Provisions, Consumer Credit Protection Act, and Public Law 90-321; 82 Stat. 146 et seq., eff. 7/1/69.

Q. Violation of 15 USC 1601-1691.

R. Search warrant is null and void.

S. Affidavit for Search Warrant is defective among other grounds, exhibits were not attached thereto.

—Said consolidated motions to Suppress Evidence and/or Dismiss Indictment filed heretofore on 9/2/76 9/17/76, 9/21/76, 12/8/76 and 1/26/77 appear at pretrial hearing of 2/3/77, pp. 187 thru 188, 197, all motions overruled by trial court on 2/3/77 in Vol. II at p. 210, with defendant's objections to that ruling, stating that the Motion to Suppress was based upon violation of defendant's rights under the 4th, 5th, 6th and 14th Amendments of the U. S. Constitution, a copy of which is in Appendix, *infra*.

8.(A) First search warrant and second search warrant are not identical documents, which appear in pretrial hearing of 1/24/77, pp. 7 thru 108; pre-trial

hearing of 2/3/77, Vol. I, pp. 3 thru 110, and in Vol. II, pp. 111 thru 153.

8.(B) Motion and Supplemental Motion for Discovery and Inspection filed 9/2/76 and 9/21/76 respectively, overruled by trial court in pre-trial hearing of 2/3/77, Vol. II, pp. 176 thru 177.

8.(C) Defense motions filed after arraignment on 4/22/76 were within discretion of the trial court granted to defendant on 4/22/76.

9. Motion for Return of Certain Records pertaining to tax records of corporation for fiscal year 4/1/75 to 3/31/76 filed 9/21/76 overruled by trial court at pre-trial hearing of 9/27/76, pp. 41 thru 42, and pre-trial hearing of 2/3/77, Vol. II, pp. 184 thru 187, partly sustained by trial court on p. 187.

10. Motion to Suppress overruled by Division II of trial court on 4/28/77, copy of which is in Appendix, *infra*.

11. No knowledge and no intent, which are part of the elements of the crime are discussed at pre-trial hearing of 2/3/77, Vol. II, pp. 204 thru 210, and pre-trial hearing of 8/30/77, pp. 2 thru 9.

12. Second Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/17/76 pertaining to unlawfully seized evidence in violation of Title 5 U. S. Code, Section 552a, et seq., overruled by trial court on 9/27/76 which appears in pre-trial hearing of 9/27/76, pp. 67 thru 73.

13. Motion for Discovery and Inspection pertaining to third drawer of filing cabinet in prosecutor's office filed 9/21/76, granted by trial court at pre-trial

hearing of 2/3/77, Vol. II, pp. 178 thru 184 missing from prosecutor's office after a Motion to Produce and Disclose was filed, and pre-trial hearing of 4/28/77, pp. 5 thru 11, and pre-trial hearing of 5/3/77, pp. 5 thru 7.

14. Motion to Suppress Evidence and/or Dismiss Indictment filed 9/2/76 pertaining to violation of Kentucky Revised Statute 360.260 stating disclosure of evidence to state must meet Federal requirements, denied by trial court on 9/27/76 which appears at pre-trial hearing of 9/27/76, pp. 69 thru 71.

15. Second Supplemental Motion to Suppress Evidence and/or Dismiss Indictment filed 9/17/76 pertaining to the contracts in question are between IET and Associates and not between Associates and the students appear in pre-trial hearing of 9/27/76, pp. 82 thru 84, delaying a ruling by the trial court until such time as said contracts are introduced as evidence during trial.

16. Forgery—Did defendant forge them or not, could have been answered by James Dibowski, Cincinnati, Ohio, retired from Federal Government, expert witness not permitted to testify at trial. (See T. of T., Vol. I, pp. 6 thru 23, 26 thru 34 and Vol. II, pp. 215 thru 222.)

17. Notice and Petition for Change in Venue filed 8/22/77, overruled by trial court on 8/31/77 at pre-trial hearing of 8/31/77, pp. 4 thru 73.

18. Elements of the crime under KRS 516.060. (See pre-trial hearing of 8/31/77, pp. 86, 94.)

19. Motion to Suppress filed 8/22/77 and 8/26/77, respectively, pertaining to voluntary disclosures and re-disclosures to third parties, at pre-trial hearing of 8/31/77, pp. 96 thru 108, pp. 110 thru 113, pp. 121 thru 125, overruled by trial court.

20. Motion for Directed Verdict filed 10/4/77 overruled by trial court pertaining to failure of prosecution to prove elements of the crime. (See T. of T., Vol. XIV, pp. 1991 thru 2004, 432 thru 435 and Vol. XVI, p. 2212, a copy in Appendix, *infra.*)

Trial court's Instructions at T. of T., Vol. XVI, pp. 2206 thru 2215, also T. of T., Vol. XIV, pp. 1987 thru 1988; Vol. IV, p. 526; Vol. III, p. 342, a copy in Appendix, *infra.*

22. Motion for New Trial filed 10/11/77 denied by trial court, self-explanatory, a copy in Appendix, *infra.*

23. Supreme Court of Kentucky Memorandum Opinion Per Curiam Affirming, entered 6/12/79, a copy in Appendix, *infra.*

24. Petition for Rehearing, Modification or Extension filed with Supreme Court of Kentucky on 6/27/79, a copy in Appendix, *infra.*

25. Denial of Appellant's Petition for Rehearing, Modification or Extension and Mandate of Supreme Court of Kentucky dated 7/24/79, a copy in Appendix, *infra.*

26. Application for Stay, filed 8/19/79 granted by the Supreme Court of Kentucky on 8/23/79 staying execution and enforcement of the mandate to and including 11/21/79 within which time for appellant to file his petition for writ of certiorari to the Supreme Court of the United States, a copy in Appendix, *infra.*

ARGUMENT

Reasons for Granting the Writ

McCracken Circuit Court of Paducah, Kentucky convicted appellant, Jerome A. (Jerry) Knapp, on October 6, 1977, which conviction was appealed to the Supreme Court of Kentucky, Frankfort, Kentucky, affirming the trial court on Federal questions of substance not in accord with the applicable decisions of the Supreme Court of the United States.

Appellant was illegally arrested on Friday, 4/9/76 without an arrest warrant or any probable cause and confined in the McCracken County Jail until Monday, 4/12/76. An arrest warrant for appellant was executed by the Judge of the McCracken Quarterly Court on 4/12/76 based upon a 25 count complaint executed by the Assistant Commonwealth Attorney on 4/12/76. On 4/14/76 the search and seizure of a truckload of evidence was made by the Sheriff of McCracken County, Kentucky and subsequently, Indictment No. 11922 was returned by the Grand Jury on 4/16/76.

As of 4/9/76, there was an illegal arrest of appellant without any probable cause, therefore, the search and seizure was not incidental to a lawful arrest. Copies of the 25 count complaint, arrest warrant, confinement and release of appellant are in the Appendix, *infra.*

Rights of a person who is the subject of a criminal investigation are based legally upon the 4th Amendment prohibition against unreasonable searches and seizures, the 5th Amendment right to be free from com-

pelled self-incrimination, and the 6th Amendment right to counsel. These rights are enforced by the exclusionary rule which requires that evidence obtained as a result of a violation of these rights not be admitted at trial. An arrest is a detention of the person for purposes of subjecting him to criminal prosecution. No warrant is required even if an opportunity to obtain one exists. But an arrest is reasonable only if there was "probable cause" to believe that a crime had been committed and the person had committed it. Courts have indicated a preference for warrant arrests, and suggested that in a close case, in which the existence of probable cause was at issue, it would find probable cause if the arrest was made with a warrant but not if a warrantless arrest was involved. Under the Kentucky Rules of Criminal Procedure the complaint is made before officers who are empowered to issue warrants and serve as a substitute for an affidavit. Therefore, it becomes the charging instrument and provides a record and written evidence of a formal charge. The warrant, on the other hand, is an arresting instrument. It is necessary that a written complaint be submitted before the magistrate issues a warrant in either a misdemeanor or felony cases. (See Appendix RCr 2.02, OAG 62-550.)

Under Criminal Rule 2.04, if from an examination of the complaint it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant committed it, he shall issue a warrant for the arrest of the defendant.

Under RCr 2.10 a warrant of arrest may be executed by any peace officer and he need not have the warrant in his possession at the time of arrest, but in that event he shall inform the defendant of the offense charged and the fact that a warrant has been issued, and upon request show the warrant or a copy of it, to the defendant as soon as possible. Under RCr 3.18, if the defendant is committed to jail, the magistrate shall make out a written order of confinement, signed by him, which shall be delivered to the jailer by the peace officer who executes the order of commitment.

Under KRS 431.005 a peace officer may make an arrest in obedience to a warrant or without a warrant when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony.

The 4th Amendment of the U. S. Supreme Court and Article 10 of the Commonwealth of Kentucky prohibit unreasonable seizures of the person. Such a prohibition is at the heart of requirements for a lawful arrest. The constitutional provisions prohibiting unreasonable searches limit the doctrine of search incident to arrest.

It is almost always assured that if an arrest is illegal for any reason, whether a violation of state law or the 4th Amendment, a search incident to such an arrest is unreasonable under the 4th Amendment. Phrased another way, an illegal arrest can never be considered as making a search reasonable under the 4th Amendment even if the illegality of the arrest was not itself a violation of the Federal Constitution.

Of course, if an arrest is unreasonable under the 4th Amendment, for want of probable cause or (if ever required by the 4th Amendment) for want of a warrant, then the search incident to the constitutionally violative arrest is unreasonable under the 4th Amendment. To comport with the 4th Amendment, an arrest warrant must be supported by probable cause. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 75 L. Ed. 2d 374 (1931); *Giordenello* v. *United States,* 357 U. S. 480, 2 L. Ed. 2d 1503 (1958); *Whitely* v. *Warden,* 401 U. S. 560, 28 L. Ed. 2d 306 (1971).

Defendant's 3rd Motion to Suppress states as follows:

> "1. That, the Commonwealth Attorney's office and the Sheriff of McCracken County unlawfully searched and seized the evidence in this case, without a lawful search warrant, all in violation of the 4th Amendment of the Constitution of the United States and the Constitution of the Commonwealth of Kentucky.
>
> 2. That, the Commonwealth Attorney's office and the Sheriff of McCracken County performed certain acts which violated defendant's rights under the 4th, 5th, 6th and 14th Amendments of the Constitution of the United States and the Constitution of the Commonwealth of Kentucky.
>
> DATED on this 21st day of September, 1976."

(See Transcript of Hearing dated April 28, 1977, p. 7. Also see T. of T., Vol. VI, p. 836.)

In the case of *Chimel* v. *California,* 395 U. S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) the United

States Supreme Court held on page 768 that application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The Scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.

Therefore, as a general proposition, a search conducted after an arrest whether the arrest is pursuant to an arrest warrant or without a warrant but based upon reasonable grounds or probable cause, the arresting officer must confine the search to the arrestee's person and the area from which the arrestee may obtain either a weapon or something that could be used as evidence against the arrestee.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 10 of the Constitution of Kentucky stipulates:

"The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." (See *Frank L. Rakas and Lonnie L. King, Petitioners* v. *State of Illinois,* 435 U. S. 922, 58 L. Ed. 2d 387, 98 S. Ct. ——, Argued October 3, 1978. Decided December 5, 1978.)

Court's Exhibit No. 1 is the "Affidavit for Search Warrant", which was signed by the Commonwealth Attorney on April 14, 1976, subscribed and sworn to before Raymond C. Schultz, Judge, McCracken County Quarterly Court, a copy of which appears in the Appendix, *infra.* Court's Exhibit No. 2 is the "Return of Property Found" written on a separate sheet of paper with a list of the property found but without a signature of an officer making the search or seizure, a copy of which appears in the Appendix, *infra.* Court's Exhibit No. 3 is a "Search Warrant" unsigned by anyone, a copy of which appears in the Appendix, *infra.* Court's Exhibit No. 4 is a "Search Warrant" signed by Raymond C. Schultz on April 14, 1976 at 10:07 A.M. o'clock, a copy of which appears in the Appendix, *infra.* Court's Exhibit No. 5 is a "Search Warrant", a copy of Court's Exhibit No. 3, which appears in the Appendix, *infra.*

Court's Exhibit No. 3 cannot be one and the same document as Court's Exhibit No. 4 because the letter "S" in the words search warrant begins under the letter "K" in the words McCracken County Quarterly

Court in Court's Exhibit No. 4 signed by the County Judge, and the letter "S" in the words search warrant begins under the letter "N" in the words McCracken County Quarterly Court in Court's Exhibit No. 3, in blank with no signature thereon. Court Exhibit No. 5 is a photo copy of Court's Exhibit No. 3 which is in blank and unsigned. (See Transcript of Proceedings of Feb. 3, 1977, Vol. I, pp. 3 thru 39.)

This, in essence, means that the prosecution did not obtain all of the evidence in this case under a valid search warrant and the affidavit for search warrant was too broad and indefinite, therefore defective. In fact, there was no search warrant in existence until the Commonwealth's Attorney came back from vacation on Sunday, September 26, 1976, one day before the hearing on September 27, 1976, and turned up with a search warrant to back up the sheriff's search and seizure. The Commonwealth's Attorney stated that a search warrant was in a basket on top of the sheriff's desk since April 14, 1976 (date of the affidavit), but without the sheriff's knowledge. The sheriff did not know where the search warrant was, however, he made a search and seizure of the corporate records and defendant's records, as an individual, on April 14, 1976. (See Transcript of Proceedings on Feb. 3, 1977, Vol. II, pp. 128 thru 146 and Transcript of Proceedings on January 24, 1977, p. 58 and Transcript of Proceedings on September 27, 1976, pp. 99 thru 100.)

Furthermore, the sheriff went into the corporation's offices, searched and seized corporate and individual records without the defendant or an officer of the

corporation being present. The return of property found was not signed by an officer at the time of making the search and seizure of the foregoing records. (See Transcript of Hearing dated September 27, 1976, p. 98 and Transcript of Hearing dated September 27, 1976, p. 102.)

John Bays, detective in the Commonwealth Attorney's office, had never seen a search warrant in this case. (See Transcript of Proceedings, Vol. II, pp. 149 thru 153.)

In fact, Wallace Adams, a deputy in the sheriff's office, did not sign the separate yellow sheet containing the return for property found until after the search and seizure of the individual and corporate records were made, by direction of the judge in open court. (See Transcript of Hearing of September 27, 1976, p. 114.)

Further, the affidavit upon which the search warrant was issued was too broad and indefinite, therefore defective, in that the sheriff seized a truck full of items from IET located at 1301 Broadway, Paducah, Kentucky material to the issues in this case. In the affidavit signed by Commonwealth Attorney, he stated:

> "Robert Joseph Grant stated to affiant he was on the said premises of the said IET on January 30, 1976 and saw some copies of student tuition agreements, cancelled checks, bank deposit lists, school student lists, and attendance records of said IET. That affiant makes this affidavit for the purpose of having a search warrant issued by the Court to the Sheriff of McCracken County, Kentucky to search for and seize said items mentioned above." (See

> Transcript of Proceedings dated February 3, 1977, pp. 48 thru 49, but typewritten as February 3, 1976 in error.)

During defendant's argument, defendant stated that the above statements made on April 13, 1976 by Grant were statements made to the Commonwealth Attorney, however, contrary to the above, defendant states as follows:

> "But nowhere does the affiant or his witness establish that the affiant has reasonable probable cause to believe that grounds exist for the issuance of a search warrant, that the property seized be brought before the court and retained subject to the order of the court, that the affidavit was too broad and too indefinite and on page 54 of the transcript of the hearing here on September 27, 1976, the Commonwealth Attorney himself testified that these records have absolutely nothing to do with this case. I'll turn to that page and read you exactly what he said and yet he makes the basis for his affidavit strictly on those grounds. Page 54 states: what does government loans and copies of government loans given to the school have to do with forgeries? What do cancelled checks of the school have to do with forgeries? What do the college work study payroll books where they pay students have to do with the books? What do the payroll books as to the—* * * What does that have to do as to whether or not—and the funds—to the forgeries? Then he goes on to say, if he says somebody else forged them, that can be his defense." (See Transcript of Hearing, Vol. I on February 3, 1977, pp. 90 thru 91, typewritten February 3, 1976 in error.)

This means, in essence, that there was no probable cause stated in the affidavit because the Commonwealth Attorney later admitted that the records seized from IET and defendant were immaterial to the issues in this case. This makes the search warrant, if there was one in existence, invalid and in violation of the 4th, 5th, 6th and 14th Amendments of the Constitution of the United States and Section 10 of the Constitution of the Commonwealth of Kentucky.

Substantial errors were made in the Court's instructions which misled and confused the jury as to the guilt or innocence of defendant and the amount of punishment defendant received by the jury, in violation of his rights under the 8th Amendment. The jury misunderstood the Trial Court's instructions which were as follows:

> "If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than 1 year and nor more than 5 years, in your discretion."

Whereas, the Trial Court should have instructed:

> "If you find the defendant guilty under this count * * *."

This, in effect, would not have misled and confused the jury to think that the sentence was from 1 to 5 years for the whole instruction rather than 1 to 5 years for each count. This confusion by the jury would not have resulted in an 80 year sentence in this case (T. of T., Vol. XVI, pp. 2213 thru 2215).

At defendant's hearing on October 6, 1977, defendant submitted proposed instructions taken from Stanley's Instructions and the Federal Instructions, which were denied by the Court. (See T. of T., Vol. XVI, pp. 2209 thru 2213.)

Further, substantial error was made in the Trial Court's instructions because there was no conformity of the instructions to KRS 516.060, which is the statute allegedly violated in the indictment. Conformity was not made between the instructions, the statute and the indictment. The instructions should have followed substantially the language in the indictment however, in this case, language in the instructions had no facsimile or similarity to the language in the indictment. In support of that proposition, we cite the following cases. *Hunter* v. *Comm. of Ky.*, 239 S. W. 2d 993 (1951); *Maddox* v. *Comm. of Ky.*, 349 S. W. 2d 686 (1961); *Beets* v. *Comm. of Ky.*, 437 S. W. 2d 496 (1969) and *Strong* v. *Comm. of Ky.*, 507 S. W. 2d 691, 694 (1974).

The indictment in this case read:

> "On or about ——— day of ————————, 19——, in McCracken County, Kentucky the above named defendant committed second degree criminal possession of a forged instrument, by uttering to an employee of Associates Financial Services Company of Kentucky, Inc., a retail contract and tuition agreement bearing the forged signature of ———————— and obtained therefrom said employee the sum of ———————— dollars, against the peace and dignity of the Commonwealth."

The Trial Court's instructions confused and misled the jury to believe that defendant was guilty, if Associates verified each contract contained in the indictment and if defendant had the contracts in his possession without the intent to defraud, deceive or injure Associates or some other person or persons. In other words, the Trial Court's instructions went beyond the language contained in the indctment and the statute.

Substantial error was made by the Court's instructions because there was no conformity of the instructions to the elements of the crime in this case, which again was prejudicial to defendant. The instructions should have been related and confined to the elements of the crime and evidence of the prosecution to prove the same. Instead of proving the elements of the crime under KRS 516.060, the prosecution based its case on the amount of money involved in 467 contracts discounted for $1,084,000.00 between IET and Associates over a 4 year period, all of which were not an element in the indictment or the statute. This evidence was wholly and totally inadmissible and prejudicial to the substantial rights of the defendant. The door was opened by the prosecution in his opening and closing statement, which placed the defendant in jeopardy before the jury in the position defendant had to rebut.

Substantial error was made in the Trial Court's instructions because the jury should not have been instructed upon a theory of the case not sustained by the evidence, or upon a theory opposed to the evidence. In this connection, there was no evidence introduced throughout trial of this case to prove that defendant

had "knowledge" of a forged instrument, nor was there any proof or even a scintilla of evidence that defendant forged the 16 contracts in question, or that, defendant knew who forged the contracts being the subject matter of the indictment.

The prosecution based its whole case on Associates loss of $515,000.00 allegedly sustained and allegedly resulting from the gross business of $1,084,000.00 over a 4 year period.

Defendant's value of IET stock of $300,000.00, which Associates own witness claimed was left off the corporate balance sheet as a part of the scheme was immaterial. This kind of testimony should not have been admitted into evidence because the personal holdings of defendant would not have been placed on the corporate balance sheet at all. The jury was more interested about where the money went and not whether defendant committed the crime. The prosecution further based its case upon a payoff proposed agreement never executed by IET or Associates, in order to settle a controversy between them, reflecting amounts accrued over a 4 year period.

Associates own witnesses admitted that they had no knowledge as to where the figures on the proposed contract came from. One witness gave 3 inconsistent statements as to where the figures came from. Yet, the prosecution used this inadmissible evidence to persuade the jury to convict the defendant on the 16 counts of a 41 count Indictment. Thus, the jury should not have been instructed on a theory of the case not sustained by the evidence, or upon a theory opposed to the evidence.

In support of this proposition, we cite the following cases, *Couch* v. *Comm. of Ky.,* 479 S. W. 2d 636 (1972) and *Crum* v. *Comm. of Ky.,* 144 S. W. 2d 1047 (1940).

Where defendant denied having "knowledge" of a forged instrument with the intent to defraud, deceive or injure another, the Trial Court's instructions should have been confined to those issues. However, in this case, the prosecution introduced evidence on all 41 counts of the indictment and the jury heard this evidence, saw it on the blackboard, and during recess, the jury went to the blackboard and compared figures and statements with one another. Thereafter, the prosecution dismissed 25 counts of the indictment on its own motion, giving its reasons to the Court and jury that it was in the interest of saving trial time which of course, resulted in implying to the jury that the prosecution had proven its 16 counts of other wrongdoing by the defendant. This was highly prejudicial to the substantial rights of defendant.

In this regard, the Trial Court should have given a "cautionary instruction" stating to the jury that it was improper for the prosecutor to state that he was dismissing the 25 counts simply to save time, thereby implying to the jury that it had evidence of other wrongdoing. This was substantial error and wholly prejudicial to defendant. See *U. S.* v. *Somers,* 496 Fed. 2d 723, 3rd Cir. (1974), certiorari denied 419 U. S. 832.

Substantial error was made in the Trial Court's instructions because of the misleading and confusing definition of "reasonable doubt", which the Trial Court applied to the case as a "whole", instead of restricting

it to each count. Therefore, the jury misunderstood the Trial Court's instructions and was confused by the implications derived from the wording in the instructions.

The Trial Court gave an instruction on reasonable doubt, as follows:

> "If upon the whole case you have a reasonable doubt as to the defendant's guilt * * *"

whereas the trial court's instructions should have been a reasonable doubt to each count before finding the defendant guilty. For this proposition we cite *Fitzpatrick* v. *Comm. of Ky.,* 53 S. W. 2d 221.

Furthermore, the trial court failed to charge the jury with an instruction:

> "The fact you may find the accused guilty or innocent as to one of the counts charged, should not control your verdict as to any of the other counts charged"

which, of course, the omission again misled the jury to believe that the maximum sentence on all of the counts was 5 years instead of actually being 80 years. Therefore, the first instruction should have been " * * * * count 1 through count 16" instead of the "whole case". This omission was highly prejudicial to the substantial rights of the defendant.

Now, there is nothing in the Trial Court's instructions 1 through 16 inclusive, which say anything about "knowledge", "intent", and "uttering or possession" by defendant. In fact, all that the Court's instructions

1 through 16 stated was that defendant "knew", instead of defendant having knowledge that _____ had not signed the signature on the retail contract. There is nothing in the statute that says anything about authorizations. The statute states that defendant had knowledge of a forged instrument and to defendant, the word authorization was misleading.

The third element of the statute is not even mentioned in the Trial Court's instructions Nos. 1 through 16, i.e., the uttering or possession of a forged instrument specified in KRS 516.030. (See T. of T., Vol. XVI, pp. 2210 thru 2211.)

The Trial Court moreover instructed the jury under instruction No. 17:

> "If you believe from the evidence beyond a reasonable doubt that the defendant is guilty under any of the preceding instructions, but that he performed or caused to be performed such acts in the name of or in behalf of the corporation, then he shall be deemed to be guilty the same extent as if such acts were performed in his own name or in his own behalf."

There again, the Trial Court's instructions went beyond the language in the indictment and the language in the statute. The instruction should have been limited to the "preceding counts" instead of the "preceding instructions". This again was highly prejudicial to the substantial rights of defendant.

The Trial Court stated:

> "* * * I have proposed number 17 in here. * * * I want to hear about it. I do have some reservations on it, Mark, and I will tell you why. I don't know whether anybody has ever found if that was used as an instruction before. I don't like to plow new ground without having some authority to do it, and yet on the other hand, I think that it is applicable in this case. That is my only observation at this point. So, whatever you all have to say in regard to that, let's go ahead and say it and get it on record * * * object to any of the Court's instructions which are inconsistent with those you have offered." (See T. of T., Vol. XVI, p. 2206.)

Instruction No. 17 is improper because it does not coincide with the allegations set out in the indictment. The indictment specifically states that the defendant uttered a forged instrument to Associates, and obtained thereby from said employee the sum of $2486.25. Defendant does not think that the jurors are going to be able to understand the correlation between Instruction No. 17 and the allegations in the indictment which will confuse them. (See T. of T., Vol. XVI, p 2207.)

Defendant suggested how Instruction No. 18 may be modified and the Trial Court placed something in the record on that. Defendant modified Instruction No. 18 by the following:

> "If upon the whole case, you have a reasonable doubt as to defendant's guilt, you shall find him not guilty. The term 'reasonable doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself, after hearing all of the evidence, that your mind is left in such condition that you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt."

Defendant suggested to the Trial Court that the words " * * * not whether a better case might have been proved * * * " be eliminated from that instruction, and the words " * * * you actually doubt that the defendant is guilty * * * " should likewise be eliminated from that Instruction No. 18. (See T. of T., Vol. XVI, pp. 2208 thru 2209.)

The defendant could not have a fair and impartial trial in McCracken County, Kentucky, because of the publicity and on account of the state of the public mind at that time in McCracken County, Kentucky. Defendant appended several news articles to defendant's petition since the indictment which appeared in the Paducah Sun Democrat, the only newspaper of general circulation within this community, which were false, inaccurate, over-exaggerated, detrimental and prejudicial to the substantial rights of the defendant and which defendant did not know and had no means of determining the specific source of the news stories about him. Such news articles appearing in the Paducah Sun Democrat were not only false, but that the newspaper had made other derogatory references to the defendant, which influenced the general public in this community to believe that the defendant was guilty before trial.

It would have been impossible for the defendant to impanel a jury of twelve (12) persons in McCracken County, Kentucky who would not have a pre-determined notion of defendant's guilt of the crime so charged.

Section 11 of the Bill of Rights of the Constitution of the State of Kentucky states that, in all criminal

prosecutions, the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. Defendant cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

The Petition, together with three of the affidavits and a copy of the newspaper clippings which satisfied KRS 452.210 were filed on August 22, 1977 and denied by the Court by its order in the Transcript of Hearing dated August 31, 1977. (See Transcript of Evidence dated August 31, 1977, pp. 72 thru 73.)

The prosecution placed several witnesses on the stand who were not a cross-section of the community in McCracken County, Kentucky. The witnesses for the prosecution represented business interests of the community. (See Transcript of Hearing dated August 31, 1977, pp. 4 thru 66.)

The prosecution did not return from its office the general ledger, the general journal, the payroll book, check stubs, cancelled checks, bank deposit slips and the receipt book for the period beginning April 1, 1975 and

ending March 31, 1976 in order that Federal and State income tax returns could be filed for that period, that, an extension of time to filed such returns was obtained from the Internal Revenue Service until October 15, 1976, that, necessary postings for that taxable year would involve at least 2 to 3 weeks work by a bookkeeper before a trial balance could be made for preparation of a tax return, however, the prosecution chose not to obey the Court order. (See RCr 7.24 Kentucky Rules of Criminal Procedure. Also see Transcript of Proceedings dated September 27, 1976, pp. 6 thru 17.)

In the "Consolidated Motion for Suppression of Evidence" filed on December 8, 1976, Defendant states as follows:

(1) That, an unlawful search and seizure of the evidence used against the defendant in a criminal proceeding and all evidence directly or indirectly obtained therefrom, were in direct violation of defendant's rights under the 4th, 5th, 6th and 14th Amendment of the Constitution of the United States and Section 10 of the Constitution of the Commonwealth of Kentucky and/or any pertinent rule, case law or statute promulgated thereunder.

(2) That, the unlawful search and seizure constituted an absolute invasion of defendant's right of privacy and exceeded the legal permissible limits.

(3) The evidence so unlawfully seized was not in plain view of the officers.

(4) The unlawful search and seizure was not made pursuant to defendant's consent, therefore, defendant did not waive his rights.

(5) The officers arrested defendant on April 9, 1976, made the unlawful search and seizure on April 14, 1976, but the indictment was returned by McCracken County Grand Jury on April 16, 1976, therefore, the search was not made incidental to a lawful arrest.

(6) That, there was no probable cause for the search.

(7) At no time did defendant have any weapon or something of a similar nature which could have been used as evidence against him.

(8) That, the affidavit for search warrant was too broad and indefinite, therefore defective.

(9) The first search warrant and the second search warrant were invalid for reasons stated above.

(10) That, the prosecution in its response filed on September 13, 1976, admitted that the retail contracts were between IET and Associates therefore if the student was not involved there could not be a forgery because the student's signature becomes moot.

(11) That, Title 5, U.S.C. 552a, subsection 7 (Student Privacy Act) states that written permission must have been obtained from the head of the agency before seizure. If the agency was IET, then no permission was obtained from that agency, by anyone, before seizure. If the agency was Associates, it gave the Commonwealth Attorney's office all student contracts and records prior to the indictment, this in direct violation of the Act. No criminal charges were filed against anyone at that time and no permission was obtained from the student or head of the agency, before seizure.

(12) That, the prosecution and the sheriff seized evidence which was a part of a "system of records" kept by IET.

(13) That, the search warrant is null and void.

(14) That, such instruments were in direct violation of KRS Sections 360.210 through 360.265, more specifically 360.260 which states that State law shall require disclosure of items of information substantially similar to the requirements of any applicable Federal law. This means, in essence that the retail contracts and tuition agreements between IET and Associates did not state the information which has been covered heretofore. (See RCr 8.16 and RCr 8.18 of the Kentucky Rules of Criminal Procedure. Also see, *Commonwealth* v. *Brewer,* 67 S. W. 994 and *Davis* v. *Commonwealth,* 399 S. W. 2d 711; Title 5, U.S.C. 552a, subsection 7; KRS 360.210 thru 360.265, more specifically 360.260. Also see 12 CFR Sec. 226, Title 12, Chapter II, Part 226 and Title 1, Truth & Lending Act and Title 5, General Provisions, Consumer Credit Protection Act; Public Law 90-321, 82 Stat. 146 et seq. effective July 1, 1969. Also see *Smith* v. *Commonwealth,* 504 S. W. 2d 708 (1974) and Transcript of Proceedings dated January 24, 1977, pp. 2 thru 5.)

Defendant asked the Court for an order to produce exhibits upon which basis the affidavit of the search warrant was issued, however, the Court and prosecution failed to produce the same. (See Transcript of Proceedings, Vol. I, p. 2.)

Defendant asked the Court for an order for the following:

1. That, Associates is not the injured party in this case, therefore, the indictment herein should be dismissed for failure to meet the requirements of KRS 516.060 for counts 1 through 41.

2. The affidavit for search warrant was defective on its face, as to information and substance based upon the following:

(a) No exhibits were attached to the affidavit upon which basis the search warrant was issued.

(b) Style of the affidavit did not contain the words "The Commonwealth of Kentucky" at the top of the document.

(c) The affidavit for search warrant stated that Associates had purchased from Jerry Knapp, 467 agreements which were forgeries or represented agreements on non-existent students, which were not true.

(d) Associates did not purchase said contracts from Jerry Knapp individually, but rather, from IET.

(e) The Commonwealth's attorney based his affidavit for search warrant upon the testimony of Robert Joseph Grant of Associates, yet the Commonwealth's attorney testified in open court at a hearing held on September 27, 1976, by stating on page 54 of the transcript:

> "What does Government loans and copies of records of Government loans given to the school have to do with forgeries? What do cancelled checks of the school have to do with forgeries? What do college work study payroll books, where they pay students have to do with the books? What do payroll books as to the secretary, the janitors and pay-

ment of rent, what does that have to do, as to whether or not—and the funds—to the forgeries * * *."

Yet, the Commonwealth's attorney picked up a truckload of evidence from the premises of IET which included the above, and has retained them since that time. (See RCr 8.16 and RCr 8.18 Kentucky Rules of Criminal Procedure. Also see Transcript of Hearing dated September 27, 1976, p. 54.)

The "Second Supplemental Motion to Suppress Evidence or Dismiss Indictment" filed on Sept. 17, 1976, states as follows:

"1. That, the Commonwealth Attorney's Office unlawfully seized certain records of individuals which were part and parcel of a 'system of records' from IET, without the prior written consent of the individuals in question, all in violation of Title 5, United States Code, Section 552a et seq.

2. That, Federal law cited heretofore states that no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to

the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

3. That, the Commonwealth Attorney's office did not obtain prior written request to the head of the instrumentality which maintain said records specifying the particular portion desired and the law enforcement activity for which the record is sought, all in violation of Title 5, USC Section 552a, et seq.

4. That, as further grounds, such instruments are in direct violation of KRS 360.210 thru 360.265 and KRS 360.260 states * * *.

DATED on this 17th day of September, 1976."

This Motion was overruled by the Court in its pretrial Hearings on September 27, 1976.

In 1966, Congress enacted the "Freedom of Information Act" to insure that the American public could find out how the Executive Branch of the Government was operating. (See Public Law 89-554, amended June 5, 1967 by Public Law 90-23, Section 1, 81 Stat. 54 (codified at 5 U.S.C. Section 552 (1970).) The Act requires that certain matters be published in the Federal Register, that some documents be made available for public inspection and copying, and that records not covered by the first two categories be released pursuant to a request by a member of the public unless they are exempt from disclosure. (5 U.S.C. Section 552 (Supplemented 1976).) The Act was amended in 1974 to provide easier and quicker access to government records. (Act of November 21, 1974, Public Law No. 93-502, Sections 1-3, 88 Stat. 1561.)

The Privacy Act of 1974 was enacted to restrict the collection, maintenance, use and dissemination by federal departments and agencies of information about people. (Privacy Act of December 31, 1974, Public Law No. 93-579, 88 Stat. 1896, Sec. 3 codified at 5 U.S.C.A. Sec. 552a (Supp. 1976).)

The relationship between this law and the Freedom of Information Act has been the subject of discussion and much confusion. The question of the relationship between the Freedom of Information Act and the Privacy Act arises in two situations, (1) in which a member of the public requests a record which contains personal information pertaining to someone else and (2) where an individual seeks access to a record which contains information about himself. In order to understand the relationship between the statutes, these very different situations in which the question arises must not be confused.

The Privacy Act of 1974 does not directly affect this balancing process of the requirement under the Freedom of Information Act to disclose records which are not deemed to be exempt under any provision of that law. Rather, the Privacy Act specifically authorizes disclosure from systems of records which it covers when such disclosure is required by the FOIA. (See 5 U.S.C.A. Section 552a(b)(2).) The key word is "required." The language of FOIA requires that certain matters be disclosed but does not require that anything be withheld. (See *Charles River Park "A"* v. *HUD,* 519 F. 2d 935 (D.C. Cir. 1975), *Contra, Westinghouse* v. *Schlesinger,* 392 F. Supp. 1246 (E.D. Va. (1974).)

In view of the balancing test referred to above, it appears that in many cases the intent of the Privacy Act could be defeated by Federal agencies. While release of information about an individual contained in a file to a member of the public interested in employing the individual might be a clearly unwarranted invasion of personal privacy, an argument could be made that release of that same information to another agency would not constitute such an invasion, and hence its disclosure to that agency would be "required" under the FOIA.

The free inter-agency transfer of personal information is exactly the sort of thing the Privacy Act was designed to remedy.

This, in essence, means that in this case, the Commonwealth Attorney's office seized records of students, IET corporation and the defendant as an individual, most of which were part of a "system of records" kept by IET which were violated by the Commonwealth Attorney's office and the Sheriff of McCracken County.

Don Edwards, Branch Manager of Associates, testified under cross-examination that with respect to Comm. Exhibits A & B-5, A & B-1 and A & B-3 two checks were issued by Associates dated December 30, 1975 in the sum of $2,486.25 each, one day before New Year's Eve and students and their financial status verified by Associates. The verifications were dated Decembr 30, 1975. Mr. Edwards did not do the checking himself. The deals would come in and one of his

cashiers would do the actual investigating and Mr. Edwards would state:

> "Have you verified all of the deals and found that they were actual students?"

The answer would be "Yes" and Mr. Edwards would issue the checks. Normally, Pat Driver and Debbie Cummings would do the verification. He would also state:

> "Have you verified that the students are in school?"

The girls would say "Yes" and Mr. Edwards would issue the checks.

In other words, one or more of Mr. Edwards' office employees or the office manager of Associates would verify the students or the students' names before the checks were issued by the office manager. (See T. of T., Vol. IX, pp. 1262 thru 1264; Vol. X, pp. 1327 thru 1328.)

Also, Mr. Edwards testified under direct examination that he issued a check for Comm. Exhibits 34-A-3 and 34-B-3, where there were no signatures of IET on the assignments on the reverse side of the retail contracts from IET to Associates, at the time of issuance of the check. (See T. of T., Vol. IX, pp. 1232, 1273 thru 1274.)

The checks were typed up by one of the girls of Associates, however, either Don Edwards or Ron Hanson, Branch Managers of Associates, signed these checks. (See T. of T., Vol. IX, pp. 1276 thru 1277.)

Mr. Edwards of Associates also testified that they verified the fact that the students were in school and called the students' employers. (See T. of T., Vol. X, pp. 1341 to 1342.)

Mr. Edwards further testified that the 41 contracts which were sitting in the courtroom were verified by someone in Mr. Edwards' office of Associates; that someone in Mr. Edwards' office verified that student and that particular name of the student appeared on the contract before issuance of the check. (See T. of T., Vol. X, p. 1343.)

This, in essence, means that the defendant at no time had knowledge that the contracts referred to in the indictment were forged or that the defendant uttered or possessed any forged instrument with the intent to defraud, deceive or injure another. This testimony of Mr. Edwards in verification of the contracts by Associates and the subsequent issuance of the checks corroborates the testimony of the defendant that defendant did not commit any of the elements of the crime. Further, Mr. Edwards' testimony rebuts the prosecution's circumstantial evidence of knowledge made in the prosecution's closing statement, that circumstantial evidence being the proposed agreement which was prepared by consent of both corporations (IET and Associates), after the fact and to settle a controversy between them. "Knowledge" cannot be proved by circumstantial evidence and the circumstantial evidence attempted to be proved by the prosecution was after the fact.

Defendant filed a motion for directed verdict and/or to dismiss based upon the fact that the prosecution failed to prove "knowledge" and "intent", anywhere in the record of this case. There is no direct evidence that defendant had knowledge that the instruments were forged. Therefore, defendant feels that the prosecution has failed to prove its case. It is true that defendant took the contracts over to Associates, however, Sheila McLeod and Carol Reid did not testify that the defendant knew of the alleged forgeries and the intent to defraud Associates.

The prosecution further stated to the trial court that it had direct evidence of utterance. This is not true because the prosecution tried to prove knowledge by circumstantial evidence.

All of the witnesses that the prosecution introduced could not state under oath whether the instrument was forged or by whom or when it was forged. These witnesses had absolutely no knowledge of the fact that the contracts were forged instruments. So, therefore, how could these witnesses know that defendant knew that the instruments were forged when they themselves did not even know if it was a forged instrument. Therefore, the prosecution has not proven the most crucial element of this crime, that being the knowledge and intent of the defendant that the instrument was forged and that defendant intended to injure another. All of the students and secretaries who testified could not prove knowledge and intent. All of Associates' witnesses testified that the first time they knew about this situation was on or about January 26, 1976. (See

T. of T., Vol. XIV, pp. 1992 thru 1998. Also see *Hatton* v. *Comm.,* 172 S. W. 2d 564 and *Bullock* v. *Comm.,* 60 S. W. 2d 108.)

Mr. George Schmidt, CPA since 1972 and auditor of Associates, along with all the other witnesses of Associates, admitted that he did not know anything until the meeting of January 30, 1976 with Mr. Strole, Grant, Albert, May, defendant Knapp and himself and that Schmidt had written the note dated January 30, 1976 admitting that Associates had purchased incomplete contracts by the branch and that an incomplete and inadequate credit investigation was made by the branch of Associates. (See T. of T., Vol. XIII, pp. 1850, 1860, 1882 and 1889).

Furthermore, Mr. Schmidt testified that Associates owed IET or Knapp the sum of $183,890.00 and that Knapp did not need to know about this figure. Mr. Schmidt made an inter-agency note at the bottom of this memorandum which stated to everyone that Associates needs to hide this factor from IET. (See T. of T., Vol. XIII, pp. 1878 thru 1879.)

On the other hand, Mr. Schmidt, on direct examination, denied that Associates owed IET or Mr. Knapp $183,890.00, therefore, Mr. Schmidt made inconsistent statements under oath in giving one or the other answer. (See T. of T., Vol. XIII, p. 1847.)

Mr. Schmidt testified that Associates owed IET $568,247.37 and that figure added to $183,890.00 adds up to $752,137.37 which Associates owes IET. (See T. of T., Vol. XIII, pp. 1875 thru 1876.)

Mr. Schmidt never verified the figure of $315,771.00 that was claimed as a loss by Associates. In fact, Mr. Schmidt did not know where the figure $1,847,671 came from nor any of the other figures on the blackboard displayed to the jury. (See T. of T., Vol. XIV, pp. 1904 thru 1907.)

This in essence, means that the testimony of Mr. Schmidt with regard to the amounts placed upon the blackboard for the jury to observe were figures from Associates' computer which he did not verify or could not verify. Defendant, during the trial of this case, made several motions and requests that the blackboard be removed from the observation of the jury because the figures on the blackboard were inaccurate and were not germane to the issues in the indictment. The court overruled defendant's several motions and requests throughout the trial and the jury was allowed to view the blackboard for a period of 19 days which highly prejudiced the substantial rights of the defendant.

Therefore, Mr. Schmidt's testimony proved that he did not know about the 41 contracts involved in the indictment. In fact, Mr. Schmidt did not audit or investigate how many of the 41 contracts in this case had been paid off or still had a remaining balance on them. (See T. of T., Vol. XIII, pp. 1897 to 1898.)

Mr. Kenneth R. Strole, Regional Vice-President of Associates, made three inconsistent statements as to where the figures on the blackboard which were in plain view of the jury, came from. Mr. Strole gave three separate inconsistent answers to one question, the first being on direct examination that Mr. Strole did not

know where the figures came from, then he changed his story and started to tell the jury and the court that they came from home office reports and again told the judge and jury that they came from a computer. (See T. of T., Vol. XIV, pp. 1960, 1970 thru 1972).

This, in essence, means that Mr. Strole's testimony did not prove any of the elements that the defendant is accused of in the indictment.

The only thing Mr. Strole testified to on direct examination which corroborates the testimony of the defendant and Mr. Schmidt is that the contracts were verified by Associates prior to issuance of the checks. (See T. of T., Vol. XIV, p. 1921.)

During a conference at the bench, while taking the testimony of Mr. Strole, the prosecution stated that the proposed agreement shows defendant had knowledge of this situation because he was present at the meeting and went along with this, and if this is not knowledge, the prosecution does not know what it is. (See T. of T., Vol. XIV, p. 1927.)

Here, again, the prosecution attempts to show on the part of defendant that defendant had knowledge because of Mr. Strole's testimony, however, an objection by the defense, sustained by the court, shows that the proposed agreement prepared between IET and Associates was simply to release claims by both corporations and to settle the controversy and that defendant, being an individual, was not involved in the transaction. The prosecution again was in error because this was all after the fact. (See T. of T., Vol. XIV, pp. 1932 to 1933.)

Yet, Mr. Strole and Mr. Schmidt, who were in charge of the audit staff, both decided to supend the confirmation program if the defendant would provide them with an accurate list of the students, which defendant did, and forced defendant to pledge collateral which belonged to defendant individually for the alleged loss sustained by Associates. The loss was created in behalf of Associates by the figures furnished to defendant for the proposed agreement between IET and Associates, namely, Mr. Strole and Mr. Schmidt. (See T. of T., Vol. XIV, p. 1940.)

This, in essence, means that the victims of the crime, allegedly Associates, not only verified all of the student contracts before issuing the checks, but also proposed an agreement to defendant in behalf of IET for alleged losses sustained by Associates and backed up by collateral pledged by the defendant as an individual. The pressure on the defendant was that if a criminal charge was made against any official of IET, all programs, Federal and State, would come to a close and terminate the school.

The prosecution failed to prove elements of the crime under KRS 516.060, that being:

1. A person is guilty of criminal possession of a forged instrument in the second degree when, with "knowledge" that it is forged,

2. And, with the intent to defraud, deceive or injure another,

3. He utters or possesses any forged instrument of a kind specified in KRS 516.030.

In other words, the prosecution did not prove "knowledge" or the "utterance" or "possession" of a forged instrument. The only thing that the prosecution proved was that it was a normal course for defendant and 10 other people to handle the discounting of contracts between IET and Associates over a 4 year period. As a result, the issues settled by the verdict were wholly immaterial and the jury's verdict was palpably against the evidence.

Thus, the Trial Court should have granted defendant's "Motion for a Directed Verdict and/or Motion to Dismiss" at the close of prosecution's case based upon the fact that the prosecution failed to prove every element of this crime. However, the Trial Court denied the same. (See T. of T., Vol. XIV, pp. 1991 thru 1999.)

In this case, evidence was heard on all dismissed counts by Associates' own witnesses who testified for the prosecution about 467 retail installment contracts and tuition agreements discounted for $1,084,000.00 over a 4 year period between 1972 and 1976 by IET and Associates. However, those witnesses should have been testifying only to the 16 (actually 15 or less) remaining counts of the indictment allegedly discounted between January 1975 to February 1976, being the subject matter of the indictment. For this proposition, defendant cites *U. S. v. Cooper,* 464 F. 2d 648, 10th Circuit (1972), certiorari denied 409 U. S. 1107, wherein the Court held that it may be assumed that the jury complied with the court's instructions to disregard the evidence about counts that had been dismissed by order

of the court. However, it further held that the jury cannot and must not convict on assumption.

In the case of *U. S.* v. *DeCavalcampe,* 440 F. 2d 1264, 3rd Circuit (1971), the Court held that evidence on an insufficient count was held to taint the entire conviction. Now, the insufficient counts in this case were the count on Rick Lawson, being count #1, D. Johnson, being count #2 and Alan Duhs, being count #4. The evidence on the insufficient counts tainted the entire conviction of the remaining 16 (actually 15 or less) remaining counts after the 25 counts were dismissed by the prosecution on its own motion and by order of the Court. (See above.)

In the case of *U. S.* v. *Dreyfus,* 528 F. 2d 1965, 5th Circuit (1976), the Court held that when it is determined certain counts should never have been before the jury, the possibility of prejudice must be explored.

Defendant requested a third order directing the Commonwealth Attorney to comply with the order of the Trial Court, Division I, entered on February 10, 1977, at once, before trial, to produce and disclose the verifications executed by the 25 students named in the defendant's Motion dated April 22, 1977 and filed on April 25, 1977, as to the genuineness of their signatures on the 25 retail contracts which were the subject matter of the 41 count indictment.

However, the Trial Court, Division II, again denied this Motion on May 5, 1977 appearing in the Transcript of Hearing dated May 3, 1977, pp. 1 thru 10.

It was error and an abuse of discretion under all of the circumstances for the trial court to deny appellant

(defendant) the benefit of expert testimony of James Dibowski of Cincinnati, Ohio where the prosecution had to prove defendant's "knowledge" and "utterance or possession" of a forged instrument in violation of KRS 516.060. Knowledge of the forgery remains an essential element of an uttering conviction. *Montgomery* v. *Comm.,* 224 S. W. 878 (1920). (See T. of T., Vol. I, pp. 6 thru 23; Vol. I, pp. 26 thru 34 and Vol. II, pp. 215 thru 222).

Defendant moved the Court for an order to allow defendant to submit the signatures appearing on Court's Exhibits No. 1, 2 and 4 for a spectrograph analysis to be performed by an expert in that field, for purposes of determining whether the ink used for the signatures appearing on the affidavit as compared with the ink used for the signature appearing on the search warrant, were applied at the same time or at a later time. (See T. of T., Vol. I, p. 103.)

The prosecutor in this case, states in Volume XIV, p. 1987, that counts 4, 3, 6, 8, 9, 14, 16, 21, 22, 26, 27, 30, 32, 34 and 39 are the 16 counts that he does not wish to dismiss. However, on p. 1988, he agreed with the Court that counts 4, 5, 7, 10, 11, 12, 13, 15, 17, 18, 19, 20, 24, 25, 28, 29, 31, 33, 35, 36, 37, 38, 40 and 41 be dismissed on his own motion and approved by the Court. The prosecution, previous to dismissing the 24 counts as mentioned above, also dismissed upon his own motion *count No. 1* of the Indictment naming Rick Lawson which in effect means that the prosecution has dismissed 25 counts of the original 41 count indictment. These dismissals leave remaining 15 counts of the

original 41 count indictment because *count 4* in the indictment names Alan Duhs which was *both dismissed and retained* by the prosecution and approved by order of the Trial Court. However, the Court gave 16 instructions to the jury in connection with 15 counts remaining in this case, none of which is an instruction on Alan Duhs. Furthermore, in the indictment *count 2* refers to D. Johnson. In accordance with the prosecution's motion and the court's order, no reference of *retaining or dismissing count 2* was made in T. of T., Vol. XIV, pp. 1987 and 1988, however, the court's Instruction No. 1 to the jury names D. Johnson, which is contrary to the court order appearing at T. of T., Vol. XIV, p. 1988. This, in essence, means that no instruction should have been given to the jury naming D. Johnson in connection with *count 2* of the indictment because the instruction did not fall within the prosecution's motions and the trial court's order as stated above. Therefore, error was committed by the Trial Court in allowing the jury to convict and sentence the defendant based upon erroneous instructions by the Trial Court and allowing the jury to see the exhibits in connection with *count No. 2.*

Also, refer to the "Transcript of Hearing and Sentencing" page 5 where the Court states:

> "* * * Also, at this time, the law requires that the defendant be notified of his right to appeal. I believe with this sentence of twenty years, it is appealed directly to the Supreme Court."

Mr. A. Avedisian: "So, the sentence is twenty years?"

Thereafter the court stated:

> "Yes, *five years* on each of *four counts* and the rest to run concurrently with those. The four shall be *Count #3, Count #2, Count #6* and *Count #8.* As I said, also the statute provides that at the time the Court sets sentence, it must notify the defendant of his right to appeal, which I am now doing."

This proves that the error was substantial and prejudicial to the rights of the defendant.

In support of the above, *Greene* v. *United States of America,* 358 U. S. 326, 3 L. Ed. 2d 340, 79 S. Ct. 340, the United States Supreme Court held on page 342 as follows:

> "Petitioner sought certiorari on the grounds that the sentences invalidly multiply punishments for single offenses, and that the Court of Appeals erred in failing to determine the validity of the several sentences and in holding that imprisonment for an aggregate period of 5 to 15 years is authorized by its finding that 'at least 5 of the sentences that were to run "concurrently with" the 3 consecutive sentences (are invalid).' We granted the writ to determine those questions. 357 U. S. 934, 2 L. Ed. 2d 1549, 78 S. Ct. 1386. * * *
>
> The question whether, in these circumstances, the law permits the imposition of a single 'gross sentence' upon several counts exceeding the maximum sentence that may lawfully be imposed upon any one of such counts is not presented here, for we think the Government's contention that these 15 sentences were, or may be treated as, one 'gross sentence' to imprisonment for a period of 5 to 15

years is unsupportable and is contradicted by the plain words of the recorded judgment. 'The only sentence known to the law is the sentence or judgment entered upon records of the court.' *Hill* v. *United States,* 298 U. S. 460, 464, 80 L. Ed. 1283, 1286, 56 S. Ct. 760. The judgment entered on the records of the court in this case explicitly imposed a separate sentence of from 20 months to the then permissible maximum of 5 years on each of the 15 counts. It is therefore plain that the court did not impose one 'gross sentence' to imprisonment for a period of 5 to 15 years.

The judgment makes the separate sentences on Counts Two, Four and Seven to run consecutively. Thus, if each is valid, they in sequence authorize imprisonment for an aggregate period of 5 to 15 years. But the judgment makes the separate sentences on the other 12 counts to run concurrently with each other (hence for a total period of 20 months to 5 years) and 'with the sentences imposed on Counts Two, Four and Seven,' without saying *(358 U. S. 330) whether *those 'concurrent' sentences are to run with the sentence on Count Two, with the consecutive sentence on Count Four, or with the consecutive sentence on Count Seven.

It is therefore evident that the Court of Appeals, was in error in concluding that the 5 'concurrent' sentences which it thought were valid alone support an aggregate period of improsonment of 5 to 15 years.

The rule that reversal is not required if any one of several concurrent sentences is valid and alone supports the sentence and judgment, *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 87 L. Ed. 1774,

1778, 63 S. Ct. 1375 and cases cited; *Pinkerton* v. *United States,* 328 U. S. 640, 642, note 1, 90 L. Ed. 1489, 1493, 66 S. Ct. 1180; *United States* v. *Sheridan,* 329 U. S. 379, 381, 91 L. Ed. 359, 364, 67 S. Ct. 332; *Roviaro* v. *United States,* 353 U. S. 53, 59, note 6, 1 L. Ed. 2d 639, 644, 77 S. Ct. 623; *Lawn* v. *United States,* 355 U. S. 339, 359, 2 L. Ed. 2d 321, 335, 78 S. Ct. 311, does not aid the Government, for no one of the 'concurrent' sentences, or even all of them together, could, even if geared to a particular (though invalid) consecutive sentence, support imprisonment for more than 20 months to 5 years. If any one of the consecutive sentences on Counts Two, Four or Seven be invalid it cannot be said that such of the 'concurrent' sentences as are valid will run with such invalid consecutive sentence, and thus support that much of the aggregate term of imprisonment, because the trial judge did not make the concurrent sentences to run with any particular one of the consecutive sentences. It is therefore clear, under the present sentences, that imprisonment for an aggregate period of 5 to 15 years can be sustained only if each of the consecutive sentences on Counts Two, Four, and Seven is valid. Hence it is necessary for the Court of Appeals to pass upon the validity of the consecutive sentences. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered."

This issue was argued by appellant during oral argument before the appellate court on March 13, 1979, and the motions herein stated.

Count No. 27 in the indictment refers to the forged signature of R. Essner, however, in Volume IV, p. 526, Stanley Essner testified with reference to count No. 27 of the indictment, which means that the prosecution tried to prove its case by students who were not properly named in the indictment. Another example is count No. 8 of the indictment bearing the forged signature of W. Catron instead of Randy W. Catron testifying in Vol. III, p. 342. This, in essence, means that the indictment was defective and the prosecution did not prove its case by evidence showing that W. Catron's signature was forged.

In continuing defendant's Motion for Directed Verdict and/or to Dismiss, the 16 (actually 15 or less) counts of the indictment now pending have not been proved by the prosecution. The Indictment reads as follows:

> "On or about the ___ day of _____, 19__, in McCracken County, Kentucky, the above named defendant (who happens to be Jerome A. Knapp), committed second degree criminal possession of a forged instrument by uttering to an employee of Associates Financial Services of Kentucky, Inc., a retail installment contract and tuition agreement bearing the forged signature of _____ and obtaining thereby from said employee the sum of $2486.25, against the peace and dignity of the Commonwealth of Kentucky."

The indictment is insufficient and proof is lacking by the prosecution that defendant, Jerome A. (Jerry) Knapp obtained from an employee of Associates the

sum of $2486.25 against the peace and dignity of the Commonwealth. There has been no proof to that effect whatsoever. Every witness on the stand in behalf of the prosecution stated that the checks were written to IET and not to defendant (T. of T., Vol. XIV, pp. 1998 thru 1999).

The indictment does not state that the defendant by and through the corporation, obtained this sum of money and there has been no proof to that effect. The burden of proof is on the prosecution and it has not carried out its burden (T. of T., Vol. XIV, p. 2000).

In Annotation 33 ALR 787, a different result was reached for corporate acts constituting embezzlement, instead of the case at bar, but were those of other employees and not those of an officer of the corporation to be held responsible. Thus, the indictment and the counts therein are insufficient and there has been no evidence to prove every allegation in the indictment and the statute is not a defense thereto. The Trial Court overruled defendant's motion but the same is part of the record (T. of T., Vol. XIV, pp. 2001 thru 2007).

Prosecution's Response stated as follows:

> "Albert Jones, Commonwealth's Attorney, Second Judicial District of Kentucky, Attorney for Plaintiff, states that the Contracts and Tuition Agreements which the defendant states are in violation of Federal law and Federal Regulations and are therefore, according to defendant inadmissible in evidence, are contracts and tuition agreements formulated by the defendant himself as President of his _____ and not by the victim of the

fendant's forgeries and therefore would certainly be odd that the defendant could say that the evidence would not be admissible because of his illegal contract. Besides that, the defendant has no authority on this issue.

Wherefore, plaintiff moves that the motion be overruled.

Signed_____"

Albert Jones

The Response of prosecution proves that the retail installment contracts and tuition agreements, the subject matter of the indictment, were between defendant as president of the corporation (IET) and Associates. If the students were not involved, then there could not be a forgery of the students' signatures.

The Court sustained defendant's response in the pre-trial hearings of September 27, 1976, more specifically pp. 77, 81 and 82.

Names and addresses of the informants who gave the necessary evidence to the Commonwealth Attorney's office which resulted in the forty-one (41) count Indictment being returned against defendant and the dates of notification and/or delivery of such evidence by each informant to the Commonwealth Attorney's office, with a description of the exact evidence that each informant turned over to the Commonwealth Attorney and a detailed list of the description of such evidence to be introduced at the trial of this case, were requested by the defendant, however, the prosecution did not comply with defendant's Bill of Particulars. (See RCr 6.22 Kentucky Rules of Criminal Procedure.

Also see Transcript of Proceedings dated January 24, 1977, pp. 2 thru 6.)

The prosecution did not comply with defendant's Motion for Discovery and Inspection because it did not allow the defendant to enter the third drawer of the filing cabinet located in the Commonwealth Attorney's office which housed records of IET in connection with the indictment. (See RCr 7.24, Kentucky Rules of Criminal Procedure. Also see Transcript of Proceedings dated September 27, 1976, pp. 2 thru 25. Also see Transcript of Proceedings dated August 31, 1977, pp. 90 thru 93.)

The prosecution did not comply with defendant's "Second Supplemental Motion for Bill of Particulars and/or Dismiss Indictment" filed June 20, 1977.

Defendant states as follows:

1. Time of day and date that each of the 41 retail installment contracts and tuition agreements were allegedly sold by defendant and/or IET and to whom sold.

2. Where the sale and purchase took place.

3. Who was present at that time.

4. Who purchased and accepted the same, and if a corporation, name of the officer or individual acting in behalf of the buying corporation at the time of purchase.

5. Name of the person acting in behalf of the buying corporation who approved each of the 41 contracts for purchase.

6. Name of the individual acting in behalf of the buying corporation who approved the purchase.

7. Name of the person in behalf of the buying corporation who verified the credit information on each of the 41 contracts.

8. Whether the parents and employers of the students were contacted and by whom, on each of said contracts.

9. Names of the individuals acting in behalf of the buying corporation who verified the students' signatures, if any, at the bottom of each of said contracts, at the time of purchase.

10. Whether all 41 contracts in the indictment had a student's signature at the bottom of the contract at time of purchase, and if not, the names of students whose signatures did not appear at the bottom of the contract at that time.

11. How many said retail contracts were sold to the buying corporation that did not have a student's signature at the bottom of said contract, and the names of the students so involved.

12. Any other evidence essential to the elements of the offense so charged against the defendant.

13. The Commonwealth's attorney has made an admission on page 170 of the Transcript of Hearing held by the Trial Court on February 3, 1977, that defense counsel is entitled to receive the foregoing information before trial and that defendant's counsel demanded the same. (See RCr 6.22, Kentucky Rules of Criminal Procedure. Also see Transcript of Hearing dated August 31, 1977, p. 3.)

On August 22, 1977, defendant moved for an order of the Trial Court, which was denied, in that the disclosures and redisclosures of the 41 contracts contained in the indictment must be suppressed as evidence in this case because of violation of Title 20, U.S.C. 1232(g) and other pertinent statutes. On that date, defendant further moved that the prosecution's answer to defendant's bill of particulars states that the 41 contracts had an applicant's signature at the bottom of each of said contracts at the time of sale and purchase thereof "so far as known to the Commonwealth", however, defendant states that each of said contracts did not have an applicant's signature at the bottom at the time of sale and purchase thereof. On that date, defendant further moved that each of said 41 contracts lacked legal efficacy upon the grounds that there were no finance charges and other information required by law reflected in said contracts between Associates and IET, that, after taking into account all of the holdbacks, interest and finance charges improperly and illegally made by Associates with respect to the contracts in the indictment, there was no victim in this case to support the charge made against the defendant under KRS 516.060. (See RCr 8.16 and RCr 8.18 Kentucky Rules of Civil Procedure; also see Title 20, U.S.C. 1232(g) and Transcript of Hearing dated August 31, 1977, pp. 94 thru 104.)

On August 26, 1977, defendant moved for an order of the Trial Court, which was denied, in that records of the students who were the subject matter of the 41 count indictment were seized by the Commonwealth Attorney's office by subpoena issued therefor, which records were located at IET and at the Paducah Bank and

Trust Company, that no notification whatever was given by the Paducah Bank and Trust Company to the defendant, who was custodian of the records, in order to enable defendant to obtain the consent of the student or parent before a disclosure and redisclosure was made by said bank to the Commonwealth Attorney's office or any other third party whomsoever.

On that date, defendant further moved that the Commonwealth Attorney's office should have notified defendant, who was custodian of the student records, prior to seizure by subpoena of said student records located at said IET and at said bank, in order to enable defendant, as custodian, to notify the student or parent and to give the opportunity of the student, parent and custodian to inspect and correct any discrepancies contained in said records and to obtain the necessary consent and approval before disclosure and redisclosure of the same.

On that date, prior to the issuance of any subpoenas for said records, said bank voluntarily furnished photo copies of said students' records to Associates, without first permitting the student or parent and defendant to inspect and correct any discrepancies contained in the same, and without the necessary consent or approval of anyone in connection therewith, all in violation of defendant's substantial rights under Title 20, U.S.C. 1232(g), the Constitution of the United States and the Constitution of the Commonwealth of Kentucky. (See RCr 8.16 and RCr 8.18 Kentucky Rules of Criminal Procedure, also see Transcript of Hearing dated August 31, 1977, pp 94 thru 104.)

The prosecution, in its response stated as follows:

1. As ground No. 1 defendant's motion regarding disclosure of the retail contracts which are the subject matter of the indictment (defendant states) violated the Privacy Act of 1974. The prosecution denied that this violated Title 20 U.S.C. for a number of reasons, some of which are that this law obviously did not apply to situations similar to this; that, this law merely placed economic sanctions upon the educational institution which allowed other persons access to educational records of students. Having read the law, the prosecution stated that this would apply where an educational institution such as IET allowed collection agencies, mailing lists, or things of that nature into the files of said school. The prosecution further stated that this is a lawful Search Warrant upon which an educational institution was being run partially on funds which were illegally obtained by the defendant herein, Jerome A. (Jerry) Knapp.

With regard to the prosecution's ground No. 1 defendant states that the prosecution did not address himself to Associates, but rather, only to the school. Furthermore, the prosecution stated that the law merely placed a "penalty" on educational institution, however, defendant is talking about "voluntary disclosures" in his motion of August 22, 1977 and nothing else. Defendant is not talking about penalties or economic sanctions upon the institution. Furthermore, defendant states that the school got the funds and not the defendant individually, which is corroborated by the evidence in this case.

2. As ground No. 2 of defendant's motion, defendant denied that each contract had a signature at the bottom at time of sale and purchase thereof. The prosecution states that this is strictly a question of proof and not a matter which should be heard upon a motion to dismiss.

Defendant states that the burden of proof was on the prosecution which the prosecution failed to carry.

3. As to ground No. 3 in which defendant stated that each of the 41 contracts lacked legal efficacy upon grounds that there were no finance charges and other matters as required by Federal law, once again the proscution stated that this had no bearing upon the case at hand. The prosecution stated that what defendant referred to was the Truth in Lending Law and that law simply requires that a consumer be given certain information regarding finance charges.

Further, the law goes on to state that if a consumer is not provided with this information, the consumer can bring legal action within one year's time. This law does not apply to this case, but even if it did, the only person who could bring an action would be the consumer, and under the law, Knapp was not the consumer, but the students were. Nevertheless, the Truth in Lending Law does not make a contract void nor voidable. It too provided sanctions against a person disobeying said law and if there was found to be a violation, the consumer could recover damages of twice the finance charges not to exceed a minimum of $100.00 or a maximum of $1,000.00.

Defendant states as his argument that he is not talking about only Federal law, but also Kentucky law. Also, defendant is not talking about the Truth and Lending Law only. He is also talking about the violation of Title 20 U.S.C. 1232(g) and KRS 360.210 to 360.265 in his motion to suppress or dismiss.

4. As to ground No. 4 of defendant's motion to suppress, the prosecution denied that the holdbacks, interest and finance charges were improperly and illegally made by Associates with respect to the contracts in question, since those contracts were made in conformity with the dealer arrangement entered into in July 1972 between IET and Associates, said agreement having been signed by the defendant, as well as his partner, Richard May, Marilyn May and Mr. Strup of Associates. Hence, large amounts of money were fraudulently procurred by the defendant, and there was a victim in this case.

Defendant states as his argument that there was no mention made of finance or interest charges in the dealer agreement. The prosecution must have been referring to a Security Agreement which has nothing to do with this case. Interest and finance charges were made against IET and not the student and the dealer agreement was only signed by defendant Knapp and not the others.

Defendant also states that Associates was not the victim in this case as shown by the evidence. Therefore, the prosecution did not prove who the victim was in this case, even though the prosecution stated on page 72 of the Transcript of Hearing dated September 27,

1976 that Associates was the victim. (See Transcript of Hearing dated September 27, 1976, pp. 67 thru 84.)

Defendant's Motion to Suppress filed Sept. 2, 1976 states as follows:

> "1. That, the 41 allegedly forged instruments allegedly uttered to an employee of Associates Financial Services Company of Kentucky, Inc., (retail installment contracts and tuition agreements) between IET and Associates, bearing the allegedly forged signatures of several parties named in the criminal indictment returned herein the above styled action allegedly in violation of KRS 516.060, as set out in said indictment, do not meet the requirements and are in direct violation of the Federal Reserve Board Regulation 'Z'.
>
> 2. That, as further grounds, such instruments are in direct violation of 15 USC Sections 1601-1691 and/or any other pertinent Federal Statute in relation thereto.
>
> 3. That, as further grounds, such instruments are in direct violation of KRS 360.210 through 360.265 and KRS 360.260 states that State law shall require disclosure of items of information substantially similar to the requirements of any applicable Federal law. To effectuate this intent, notwithstanding any provisions of KRS 360.210 through 360.265 to the contrary, the Commissioner is specifically authorized, empowered and directed to adopt such interim regulations governing the information to be disclosed and the manner of disdisclosure so as to assure that the requirements of the State law meet the requirements of such applicable Federal law effective January 1, 1969.

> 4. That, the foregoing evidence did not meet the requirements as set out above, thus, the same should be suppressed and/or the indictment herein be dismissed.
>
> DATED on the 2nd day of September, 1976."

Written permission must have been obtained "before seizure" of the records from the "head" of the agency. If the agency was IET, then no permission was obtained. If the agency was Associates, they gave the Commonwealth Attorney "all" student contracts and records relating thereto, prior to the indictment, thus in violation of the Act. No criminal charges had been filed before seizure and no permission was obtained from the student or head of the agency.

Furthermore, it was Associates responsibility to inform the student that the retail installment contract and tuition agreement had the required "Notice of the Right of Recision", attached thereto. However, they did not notify the student nor was it attached thereto.

The student was not notified by Associates of the following:

1. The total dollar amount of the finance charge.
2. Date upon which the finance charge begins to apply, if this date is different from the date of the transaction.
3. The annual percentage rate (for exception see Reguiation "Z"/228.8(b)(2)(i)(ii).
4. The number, amounts and due dates of payment.
5. Total payments.
6. Amount charged for any default or delinquency.
7. Description of any security held for the loan.

8. Description of any penalty for pre-payment of principal.

9. How the unearned part of the finance charge is calculated in case of pre-payment. Charges deducted from any rebate or refund must be stated.

Associates did not do any of the foregoing, thus violated Regulation "Z". (See Transcript of Hearing dated September 27, 1976.)

(See 12 CFR Section 226, Title 12, Chapter II, Part 226 and Title I Truth & Lending Act and Title V, General Provisions, Consumer Credit Protection Act; Public Law 90-321; 82 Stat. 146 et seq., effective July 1, 1969, overruled by the Trial Court in Transcript of Hearing dated September 27, 1976, pp 76 thru 79, 83 thru 84.

Defendant requested the results from any scientific or handwriting analysis and/or examination made by any expert or experts of any evidence that the prosecution intended to use in the trial of this case and any exculpatory evidence in the possession of, or known to, the prosecution which was favorable to defendant under the latest Supreme Court case of *Brady* v. *Maryland,* which the Court granted but prosecution failed to disclose.

Defendant further requested student acknowledgements as to the authenticity of the students' signatures on the 41 contracts in the indictment, all of which disappeared from the Commonwealth Attorney's office some time prior to the trial of this case. The Court denied the same. (See Transcript of Hearing dated April 27, 1977, p. 11.)

Defendant, in his argument for a directed verdict states as follows:

1. Defendant moved the trial court to direct the jury to find for the defendant at the conclusion of the commonwealth's evidence and/or to dismiss the indictment and again renewed the motion at the end of the case directing the verdict or dismiss the indictment returned against defendant upon grounds that the evidence affirmatively showed that defendant had not committed a crime, as a matter of law, as specified in the 41 count indictment returned on April 16, 1976 and upon further grounds that the commonwealth attorney, at the conclusion of his case, failed to prove the elements of the crime under KRS 516.060. The trial court denied the same.

2. As further grounds for defendant's motion, without any direct evidence, the prosecution relied solely on circumstantial evidence to prove its case. The crime defendant was charged with could not be proved merely showing that at one time defendant had possession of the retail installment contracts and tuition agreements referred to in the indictment, where such instruments passed through several hands before and after delivery and discounted and purchased by Associates. No attempt or proof was established by the prosecution to identify those persons having the "knowledge" of the forged instruments with the intent to defraud, deceive or injure another.

3. As further grounds for defendant's motion, the prosecution stipulated in open court that the students named in the 41 count indictment did not know whether

the defendant had knowledge that the student contracts in question were forged, nor did said students know whether the defendant had the intent to defraud, deceive or injure another by allegedly uttering the contracts to Associates.

4. Defendant states that the prosecution did not prove by direct or circumstantial evidence that defendant had the "knowledge" that the contracts in the 41 count indictment were forged, nor did the prosecution prove that the defendant had the intent to defraud, deceive or injure another. The prosecution only proved that the defendant had taken some of the said contracts to Associates, which alone does not prove the elements that defendant is charged with under KRS 516.060.

5. Defendant further states that any evidence that the prosecution introduced to show a motive for the claim did not prove the elements of the crime under KRS 516.060 against the defendant. (See T. of T., Vol. XIV, pp. 1991 thru 2004. Also see *Van Winkle* v. *Comm. of Ky.,* 7 S. W. 2d 845; *Fain* v. *Comm.,* 154 S. W. 2d 553; also KRS 500.070; *Bullock* v. *Comm.,* 60 S. W. 2d 108; *Hatton* v. *Comm.,* 172 S. W. 2d 564 and *State* v. *Ross* (1909), 55 Or. 450, 42 LRA (N.S.) 601, 104 Pac. 596.)

Furthermore, the prosecution stipulated the first two of the four stipulations and refused to stipulate the two remaining stipulations. (See T. of T., Vol. XIV, pp. 432 thru 435.)

This, in essence, means that prejudicial error was made by the trial court in allowing the jury to hear

the prosecution talk about the elements of the crime which the prosecution failed to prove. This argument should have been done in Chambers instead of before the jury.

Defendant renewed his motion for a directed verdict on grounds that the prosecution failed to identify which of the 32 counts actually belonged to the 16 remaining counts of the indictment and the court also overruled the same. (See T. of T., Vol. XVI, p. 2212.)

Defendant states in his "Motion for New Trial" filed on October 11, 1977 and heard on October 28, 1977, the grounds upon which his rights were violated, a copy of which is in the Appendix, *infra,* for the Court's information. This motion was denied by the trial court on October 28, 1977.

Lastly, the prosecution did not introduce competent and relevant evidence to support its opening and closing statement which appear in the record of this case. (See T. of T., Vol. II, pp. 224 thru 252 for prosecution's Opening Statement and Vol. XIV, pp. 2250 thru 2288 for Closing Statement.)

The sentence and punishment received by Appellant (defendant) in the trial court was far severe and in violation of his rights under the 8th Amendment of the Constitution of the United States.

CONCLUSION

This is a tragic miscarriage of justice and a violation of the substantial rights of Appellant (defendant) under the Constitutions of the United States and the Commonwealth of Kentucky, therefore, the conviction should be reversed, or remanded for a new trial.

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Attorneys for Appellant or Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certify that forty (40) copies of the foregoing Petition for Writ of Certiorari to Supreme Court of the United States were served upon the Clerk, U. S. Supreme Court, 3rd and Constitution Avenue, N. W., Washington, D. C. 20001, and one (1) copy upon each of the justices of the Supreme Court of Kentucky, Office of the Clerk, Room 209, Frankfort, Kentucky 40601, and three (3) copies upon Honorable Robert F. Stevens, Attorney General, Attorney General's Office, Commonwealth of Kentucky, Frankfort, Kentucky 40601, and one (1) copy upon Honorable Lloyd C. Emery, II, Circuit Judge, Division I, McCracken Circuit Court, Courthouse, Paducah, Kentucky 42001, and one (1) copy upon Honorable J. Brandon Price, Circuit Judge, Division II, McCracken Circuit Court, Courthouse, Paducah, Kentucky 42001, and one (1) copy upon Mark P. Bryant, Esquire, Commonwealth Attorney, Second Judicial District of Kentucky, McCracken County Courthouse, Paducah, Kentucky 42001, and one (1) copy upon Honorable Alfred Obermark, Clerk, McCracken Circuit Court, McCracken County Courthouse, Paducah, Kentucky 42001, by mailing same, postage prepaid, to their last known address on this the _____ day of _____, 1979.

All parties required to be served have been served with the foregoing Petition for Writ of Certiorari.

_____

MICHAEL AVEDISIAN

_____

ANDREW H. AVEDISIAN

Attorneys for Appellant